EDITOR'S NOTE

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o. 86-97-AFX  Title: Indiana, Appellant
tatus: GRANTED  v.
Dynamics Corporation of America, et al.

ocketed:  Court: United States Court of Appeals
uly 22, 1986  for the Seventh Circuit

ide:  Counsel for appellant: Pritchard, John F.
86-71

Counsel for appellee: Sachnoff, Lowell E.

| ntry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Jul 22 1986 | G | Statement as to jurisdiction filed. |
| 2 | Aug 25 1986 | | Motion of appellee Dynamics Corp. of Am. to affirm filed. VIDED. |
| 3 | Sep 3 1986 | | DISTRIBUTED. September 29, 1986 |
| 4 | Sep 2 1986 | | Lodging received. |
| 6 | Aug 25 1986 | | Appendix of appellee Dynamics Corp. of America filed. VIDED. |
| 7 | Oct 6 1986 | | PROBABLE JURISDICTION NOTED. The case is consolidated with 86-71, and a total of one hour is allotted for oral argument. Justice Scalia OUT. *************************************************** |
| 9 | Nov 6 1986 | | Order extending time to file brief of appellant on the merits until December 4, 1986. |
| 10 | Nov 6 1986 | G | Motion of appellant to dispense with printing the joint appendix filed. |
| 11 | Nov 17 1986 | | Motion of appellant to dispense with printing the joint appendix GRANTED. |
| 12 | Nov 20 1986 | | Record filed. |
| 13 | Nov 20 1986 | | Certified copy of C. A. proceedings received. |
| 14 | Dec 4 1986 | | Brief amicus curiae of New York filed. VIDED. |
| 15 | Dec 4 1986 | | Brief amicus curiae of Minnesota filed. VIDED. |
| 16 | Dec 3 1986 | | Brief amicus curiae of Indiana Chamber of Commerce filed. VIDED. |
| 17 | Dec 4 1986 | | Brief of appellant Indiana filed. |
| 19 | Dec 19 1986 | | Order extending time to file brief of appellee on the merits until January 20, 1987. |
| 21 | Dec 20 1986 | G | Motion of appellants for divided argument filed. |
| 22 | Dec 19 1986 | | SET FOR ARGUMENT. Monday, March 2, 1987. This case is consolidated with No. 86-71. (3rd case) (1 hour). |
| 23 | Jan 15 1987 | | Record filed. |
| 24 | Jan 15 1987 | | Certified copy of original record on appeal received. (3 boxes). |
| 25 | Jan 20 1987 | | Brief amicus curiae of United Shareholders Assn. filed. VIDED. |
| 26 | Jan 20 1987 | | Brief amicus curiae of United States filed. VIDED. |
| 27 | Jan 22 1987 | | CIRCULATED. |
| 28 | Jan 20 1987 | X | Brief amicus curiae of Securities Industry Assn., Inc. filed. VIDED. |
| 29 | Jan 20 1987 | X | Brief of appellee Dynamics Corp. of America filed. VIDED. |
| 30 | Feb 23 1987 | | Motion of appellants for divided argument GRANTED. |
| 31 | Mar 2 1987 | | ARGUED. |

86-97 (2)
No.



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF INDIANA,

*Intervenor-Appellant,*

vs.

DYNAMICS CORPORATION OF AMERICA, et al.,

*Appellee.*

On Appeal from the United States Court of Appeals for the Seventh Circuit

## JURISDICTIONAL STATEMENT OF INTERVENOR-APPELLANT STATE OF INDIANA

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July 22, 1986

91pp

## QUESTIONS PRESENTED

1. Whether the Control Share Acquisitions Chapter of the Indiana Business Corporation Law, Ind. Code Ann. §§ 23-1-42-1 to -11 (Burns Cum. Supp. 1986), which makes the post-acquisition voting rights of "control shares" of covered Indiana corporations subject to a majority vote of all shareholders other than the acquiring entity and incumbent management, is unconstitutional under the Supremacy Clause because preempted by the Williams Act, 15 U.S.C. §§ 78(m)(d)-78(m)(e), 78(n)(d)-78(n)(f) (1981), which Federal statute regulates only disclosures to shareholders and the purchase of shares in tender offers.

2. Whether the Control Share Acquisitions Chapter, which does not

discriminate against interstate commerce or out-of-state residents, applies only to Indiana corporations with other substantial ties to the State, and regulates shareholder voting rights as a matter of the State's general corporation law governing the internal affairs of Indiana corporations, is unconstitutional under the Commerce Clause.

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## OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, was issued on April 9, 1986. It is contained in the Appendix to a Jurisdictional Statement filed with this Court in this action by Appellant CTS Corporation at A29*. The supplemental opinion of the District Court was issued on April 16, 1986. (CTS App. A88) The final opinion of the United States Court

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* References to "(CTS App. ________)" are to the Appendix submitted in connection with the Jurisdictional Statement of CTS Corporation, upon which the Intervenor-Appellant relies.

of Appeals for the Seventh Circuit was issued on June 9, 1986.* (CTS App. A1)

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* Rule 15.1.(b) LISTING: In Seventh Circuit No. 86-1601, containing the constitutional issues presented by this appeal, the parties were Dynamics Corporation of America ("DCA") as Plaintiff-Appellee; CTS Corporation ("CTS") and Robert Hostetler, Gary Erekson, and Joseph DiGirolamo, in their respective capacities as officers and/or directors of CTS, as Defendants-Appellants; and the State of Indiana, as Intervenor-Appellant. Seventh Circuit No. 1608 involved the same action in the District Court, and was consolidated with No. 86-1601 for decision by the Seventh Circuit (App. A13), but did not involve the questions presented in this appeal.

Rule 28.4.(c) Listing: By its Memorandum Opinion and Order in Dynamics Corporation of America v. CTS Corporation, No. 86-C-1624, slip op. (N.D. Ill. April 16, 1986), the United States District Court for the Northern District of Illinois, Eastern Division, certified the judgment in that case for immediate appeal and certified the "appeal" under 28 U.S.C. § 2403(b) (West 1985) to the Indiana Attorney General for purposes of intervention. (CTS App. 125)

## JURISDICTION

This civil action was commenced in the United States District Court for the Northern District of Illinois, Eastern Division, by Appellee Dynamics Corporation of America ("DCA") against Appellant CTS Corporation ("CTS") and others. As relevant to this appeal, the complaint alleged that the Control Share Acquisitions Chapter of the Indiana Business Corporation Law, Ind. Code Ann. §§ 23-1-42-1 to -11 (Burns Cum. Supp. 1986) (the "Indiana Statute") is unconstitutional because it violates the Supremacy Clause, U.S. Const. art. VI, cl. 2, and the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, of the Constitution of the United States. Federal jurisdiction was based upon 15 U.S.C. § 78aa, 28 U.S.C. §§ 1331 and

1332 (West 1986), and the doctrine of pendent jurisdiction.

In its opinions dated April 9 and April 16, 1986 the District Court held the Indiana Statute unconstitutional (CTS App. A88) and on April 16, 1986 entered judgment in favor of CTS on this issue. (CTS App. 139) By its opinion dated April 16, 1986 the District Court certified its judgment for immediate appeal under 28 U.S.C., Fed. R. Civ. P. 54(b) (West 1986). (CTS App. A124) By that same opinion the District Court also for the first time certified "the appeal" to the Attorney General of the State of Indiana pursuant to 28 U.S.C. § 2403(b) (West 1986). (CTS App. A124-25) That statute provides that a state is entitled to intervene in any action, suit or proceeding in a court of the United States "wherein the

constitutionality of any statute of that State affecting the public interest is drawn in question." Id. The Indiana Attorney General did not receive certification pursuant to 28 U.S.C. § 2403(b) until after the conclusion of proceedings in the District Court and was unable to present evidence or argument in the action. (CTS App. A89)

On April 19, 1986, Intervenor-Appellant filed a motion to intervene in an appeal taken by CTS to the United States Court of Appeals for the Seventh Circuit (the "Seventh Circuit") from the judgment of the District Court entered in accordance with its opinions holding the Indiana Statute to be unconstitutional on both Supremacy and Commerce Clause grounds.

(App. A7)* An order of the Seventh Circuit granting the state's motion to intervene was issued on April 22, 1986. (App. A11) On April 18, 1986, the Seventh Circuit consolidated the various appeals for purposes of briefing and argument and granted Appellants' request for expedited appeal. (App. A13) On April 23, 1986, the Seventh Circuit entered its judgment and an order affirming the judgment of the District Court (CTS App. A126, A129) and on June 9, 1986 issued its opinion addressing the constitutional issues presented (CTS App. A1).

The State of Indiana timely filed a notice of appeal to this Court

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* References to "(App. ___)" are to the Appendix of Intervenor-Appellant filed with this Jurisdictional Statement.

in the Seventh Circuit on April 25, 1986. (App. A1) This Jurisdictional Statement is being filed in this Court within ninety days after the entry of the judgment from which this appeal is taken. 28 U.S.C. § 2101(c) (West 1986). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(2) (West 1986).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

Relevant portions of the First and Sixth Articles of the United States Constitution, the Williams Act of 1968 and the Indiana Business Corporation Law are set forth at page A140 of the Appendix to the Jurisdictional Statement of Appellant CTS Corporation filed in connection with this Appeal.

## STATEMENT OF THE CASE

### A. The Dynamics Corporation of America Tender Offer and Litigation.

Appellee Dynamics Corporation of America ("DCA"), a New York corporation with its principal place of business in Connecticut, announced a tender offer on March 10, 1986 for at least 1,000,000 of the approximately 5,700,000 outstanding voting shares of Appellant CTS Corporation ("CTS"), an Indiana corporation with its principal place of business in Indiana. As DCA already owned approximately 9.6% of CTS' outstanding voting shares, consummation of the tender offer would have given it approximately 27.5% of such shares. On the same date DCA announced a proxy contest to elect its own candidates to the CTS board of directors at CTS'

annual meeting scheduled for April 25, 1986.

On March 10, 1986, DCA filed this action in the United States District Court for the Northern District of Illinois, Eastern Division, which originally alleged claims unrelated to this appeal. Upon CTS' election to be governed by the new Indiana Business Corporation Law, including the Control Share Acquisitions Chapter described below, DCA amended its complaint to seek an injunction against enforcement of the Chapter on the ground that its provisions are unconstitutional.

B. The Control Share Acquisitions Chapter of the Indiana Business Corporation Law.

On March 4, 1986, Indiana enacted a new Business Corporation Law, Ind. Code Ann. §§ 23-1-17-1 to 23-1-54-2 (Burns Cum. Supp. 1986), which revises

the State's corporation code and which contains a chapter entitled "Control Share Acquisitions". Ind. Code Ann. §§ 23-1-42-1 to -11 (CTS App. A167) (the "Indiana Statute"). While the new law becomes applicable to all Indiana corporations on August 1, 1987, corporations may elect to be governed by its provisions prior to that date. Ind. Code Ann. § 23-1-17-3. CTS elected to be governed by the new law effective April 2, 1986.

The Indiana Statute applies by its terms to any Indiana corporation*

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* The term "corporation" is defined for purposes of the Business Corporation Law, including the Control Share Acquisitions Chapter, as "a corporation for profit that is not a foreign corporation, incorporated under or subject to the provisions of this Article." Ind. Code Ann. § 23-1-20-5. The Seventh Circuit recognized in its opinion

with 100 or more shareholders that has its principal place of business, its principal office, or a substantial amount of its assets within Indiana. Application of the statute is further limited to corporations in which a substantial number of the shares are held by, or a substantial number of shareholders are, Indiana residents. Ind. Code Ann. § 23-1-42-4(a).

The Statute does not govern the purchase, sale or transfer of shares of stock of subject Indiana corporations. Rather, it supplements the portions of the new Indiana Business Corporation Law

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(footnote continued)

that the Control Share Acquisitions Chapter applies only to corporations "incorporated in Indiana." (CTS App. A19)

governing voting rights of shareholders of Indiana corporations. The Statute governs the voting power of "control shares" which are defined as acquired voting shares which, when aggregated with all other shares of the corporation owned by the acquirer, pass one of three thresholds of voting power--20%, 33.3% or 50%. A person who acquires control shares may not vote them until the shares are granted voting rights by a majority vote of the existing disinterested shareholders. The procedure for obtaining the requisite shareholder vote is described below.

## THE QUESTIONS ARE SUBSTANTIAL

The Control Share Acquisitions Chapter of Indiana's new Business Corporation Law, Ind. Code Ann. §§ 23-42-1 to -11 (Burns Cum. Supp.

1986)(the "Indiana Statute") does not regulate or interfere with the acquisition--by tender offer, open market or private purchases or otherwise--of shares of the Indiana corporations it governs. Rather it regulates the circumstances under which a person acquiring control shares of an Indiana corporation is entitled to vote them. Accordingly, the Statute deals with the internal affairs of Indiana corporations, specifically the circumstances under which a person who purchases "control shares" may use the voting power of the shares to exercise influence or control over the corporation.

The questions presented on this appeal--whether a state statute regulating the voting rights of

shareholders of its own domestic corporations is unconstitutional under the Supremacy Clause or the Commerce Clause--are novel and important to the maintenance of the proper role for state regulation of corporations against improper Federal encroachment.

This Court addressed Supremacy and Commerce Clause issues in a substantially different context in Edgar v. MITE Corp., 457 U.S. 624 (1982), in which it held the Illinois Business Takeover Act (the "Illinois Act") unconstitutional. Unlike the Indiana Statute, however, the Illinois Act regulated the takeover bid process itself by imposing a pre-commencement notification requirement on offerors and by permitting a hearing at the election of incumbent management on the adequacy of the offeror's disclosure and the

fairness of its offer. 457 U.S. at 626-27. In sharp contrast, Indiana has refrained from regulating the acquisition of shares of Indiana corporations.

Since this Court's ruling in <u>MITE</u> numerous states, including Indiana, have abandoned statutes containing provisions similar to those of the Illinois Act. Many such states, like Indiana, have determined that the protection existing shareholders of their domestic corporations should have against changes in control of the corporation which they believe to be inimical to their interests, can be provided through the medium of corporate governance.*

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* <u>See</u>, <u>e.g.</u>, N.Y. Bus. Corp. Law <u>§§</u> 912, 1613 (McKinney 1985) (requiring any tender offeror

Particularly in view of the rash of litigation that can be expected

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(footnote continued)

planning to acquire twenty percent or more of a corporation's stock to seek approval from its directors for any future business combination on penalty of being barred from any such business combination for a five-year period); Ky. Rev. Stat. §§ 271A.397-99 (1984); Md. Corps. & Ass'ns Code Ann. §§ 3-601 et seq., 8-301(14) (Supp. 1984); Michigan Comp. Laws §§ 450.1775 et seq. (1984); La. Rev. Stat. Ann. §§ 12-132 et seq. (West Supp. 1985) (all requiring a tender offeror intending a "business combination" following a successful tender offer to either obtain approval from a supermajority of the corporation's voting shares and of those held by the disinterested shareholders or pay a "fair price", often defined as an amount not less than the value of the shareholder's holdings on the day prior to the date of the control transaction, to those nontendering shareholders who are forced to sell in the course of the business combination); Ga. Code Ann. §§ 14-2-232 et seq. (Supp. 1985) (requiring a tender offeror intending a "business combination" following a successful tender offer to either (1) obtain unanimous

concerning the constitutionality of new state statutes which forego regulation of the acquisition of shares, leaving

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(footnote continued)

approval by the corporation's continuing directors or (2) obtain approval by two-thirds of the continuing directors and by a majority vote of the disinterested shareholders, or to pay a "fair price" to those shareholders who sell in the course of the business combination); Pa. Stat. Ann. tit. 15 §§ 1408, 1409.1, 19.10 (Purdon Supp. 1984-85) (requiring a tender offeror to pay upon demand the fair market value of a stockholder's holdings as of the day prior to the date the control transaction occurred, and to obtain approval by a majority vote of either the disinterested shareholders or of directors independent of the acquirer prior to any second-stage merger or consolidation, unless the consideration paid therefor is not less than the highest amount paid by the interested stockholder in acquiring stock of the same class); Me. Rev. Stat. tit. 13A § 910 (1985) (requiring a purchaser to notify stockholders within 15 days of acquiring twenty-five percent of the corporation's voting shares, and, for thirty days after providing such notice, to purchase upon request any

that for the Williams Act, but regulate the exercise of voting power by the acquirer of shares or regulate other aspects of the relationship between the acquirer and the corporation, this Court should give plenary consideration to the substantial questions presented by this appeal.

I. THE INDIANA STATUTE IS NOT PREEMPTED BY THE WILLIAMS ACT.

A. The Indiana Statute

The Indiana Statute applies only to corporations organized under the

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(footnote continued)

stock held by voting shareholders for the fair value of the stock on the day prior to the date of the control transaction); Minn. Stat. §§ 80B.01 et seq. (1984) (requiring a tender offeror to pay the same amount for shares purchased during a subsequent two-year period as was paid to shareholders initially tendering shares).

laws of Indiana with 100 or more shareholders which have their principal places of business, principal offices or substantial assets within Indiana. In addition, subject corporations must have more than ten percent of their shareholders resident in Indiana, more than ten percent of their shares owned by Indiana residents or more than 10,000 shareholders resident in Indiana. Ind. Code Ann. § 23-1-42-4(a).

The Statute governs the voting power of "control shares," defining that term as voting shares that, when aggregated with all other shares of the corporation owned by the acquirer, pass one of three threshholds of voting power. Ind. Code Ann. § 23-1-42-1. Only the control shares themselves, and not shares previously owned by the acquirer, are subject to the provisions

of the Statute. A person who acquires control shares may not vote them until the shares are accorded voting rights by a majority vote of existing disinterested shareholders, that is, all shareholders except the acquirer and the officers and inside directors of the corporation. Ind. Code Ann. § 23-1-42-9.*

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* The Legislature of Indiana did not intend that the Indiana Statute be construed to permit incumbent management to vote on the voting rights issue. While Section 9 is ambiguous in this regard, the Legislature included Section 9(b)(1) only to insure the right of a class to vote as a separate voting group if the proposed control share acquisition would result in any of the changes described in Ind. Code Ann. § 23-1-38-4(a), which relates to changing the provisions of or reclassifying classes of a corporation's stock. Intervenor-Appellant was not able to present evidence to the District Court as to the Statute's proper construction and intent, "[b]ecause

To obtain the necessary shareholder vote, any person who has made or proposes to make an acquisition of control shares may deliver an "acquiring person statement" to the corporation setting forth information similar to that required by the Williams Act, and may request a special meeting of the shareholders to determine whether voting rights will be accorded. Ind. Code Ann. § 23-1-42-6. The corporation must then hold such a shareholders'

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(footnote continued)

the Indiana Attorney General [was not] properly certified pursuant to 28 U.S.C. § 2403(b) . . . ." (CTS App. A88). As the Indiana Attorney General informed the Seventh Circuit, CTS has only one class of common stock, and Section 9(b)(1) is thus irrelevant to any shareholder election on the voting rights issue in this case.

meeting within 50 days. Ind. Code Ann. § 23-1-42-7(a).

B. <u>The Williams Act</u>

The Williams Act, 15 U.S.C. §§ 78(m)(d)-78(m)(e), 78(n)(d)-78(n)(f) (1981) (CTS App. A141), was adopted in 1968 as an integral part of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a et seq. (1981) (the "1934 Act"). It does not purport to govern voting rights of shareholders of corporations organized under the laws of the various states. Rather, the Act requires that upon commencement of a tender offer, the offeror file with the Securities and Exchange Commission (the "SEC"), publish or send to shareholders of the target company and furnish to the target company detailed information about the offer. 15 U.S.C. § 78n(d)(1); 17 C.F.R. § 240.14d-3 (1981). It also

provides that stockholders who tender their shares may withdraw them during the first seven days (now fifteen by SEC regulation, 17 C.F.R. 240.14d-7) of a tender offer and, if the offeror has not purchased them, at any time after sixty days from the commencement of the offer. 15 U.S.C. § 78n(d)(5). All shares tendered must be purchased for the same price and on a pro rata basis if the offer is oversubscribed. 15 U.S.C. §§ 78n(d)(6) and (7).

## C. <u>There Is No Conflict Between the Provisions of the Williams Act and those of the Indiana Statute, and the Indiana Statute is Therefore Not Preempted.</u>

As the Seventh Circuit recognized, there is no conflict between the <u>provisions</u> of the Indiana Statute and the <u>provisions</u> of the Williams Act. It is possible for an acquirer to comply with the provisions of both laws when

purchasing control shares of an Indiana corporation. Under such circumstances, the plain language of the federal statute being construed, the 1934 Act, requires a finding that the Indiana Statute is not preempted.

Section 28 of the 1934 Act states that:

> "Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person <u>insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder</u>." 15 U.S.C. § 78bb(a) (1981) (emphasis added).

The provisions of the Indiana Statute, which deal with the voting rights of control shares do not conflict with the "provisions" of the Williams Act. Accordingly, the plain meaning of the language of the statute itself demonstrates that Congress did not

intend that the policy reflected in the 1934 Act be the basis for preempting state laws not inconsistent with the actual provisions of the Act.

This Court has frequently held that the plain meaning of a statute must be given effect and that the legislative history of an unambiguous statute is almost always irrelevant:

> Notwithstanding petitioners' argument to the contrary, we are satisfied that the statutory language with which we deal has a plain and unambiguous meaning. While we now turn to the legislative history as an additional tool of analysis, we do so with the recognition that only the most extraordinary showing of contrary intentions from that data would justify a limitation on the 'plain meaning' of the statutory language. When we find the terms of a statute unambiguous, judicial inquiry is complete, except in 'rare and exceptional circumstances'. Garcia v. United States, 469 U.S. 70, 105 S.Ct. 479, 483, 83 L.Ed.2d 472 (1984) (quoting TVA v. Hill, 437 U.S. 153, 187, n. 33, 98 S.Ct. 2279, 57 L.Ed. 2d 117 (1978)).

Accordingly, this Court should find, in accordance with the unambiguous language of Section 28 of the 1934 Act, that the Indiana Statute is not preempted by the Williams Act, and it thus need not refer to the legislative history of the Williams Act in reaching this result.

D. <u>The Legislative History of the Williams Act Does Not Support the Proposition that the Williams Act Preempts More Rigorous State Takeover Laws.</u>

At a minimum, since there is no direct conflict between the provisions of the two statutes, the test to be applied in determining whether the Indiana Statute is preempted by the Williams Act is "whether, under the circumstances of this particular case [the state's] law stands as an obstacle to the accomplishment and execution of the full purposes or objectives of

Congress." Hines v. Davidowitz, 312 U.S. 52, 67-68 (1941).

Because the subject matters of two statutes are different, the Statute is not preempted unless the Williams Act embodies some Congressional purpose which the Statute thwarts. Despite obvious reservations "stilled" only by the "weight of precedent," the Seventh Circuit sided with the plurality in MITE by holding that Congress intended in enacting the Williams Act to "[strike] a balance between target management and tender offeror that states may not upset." Dynamics Corporation of America v. CTS Corporation, Nos. 86-1601, 86-1608, slip op. at 21 (7th Cir. June 9, 1986) (emphasis added). (CTS App. A21) In so doing the Seventh Circuit conceded that "[o]f course, it is a big leap from saying that the Williams Act

does not itself exhibit much hostility to tender offers to saying that it implicitly forbids states to adopt more hostile regulations . . . ." Id. at 22. (CTS App. A22) Indeed, as Judge Posner pointed out, the legislative history states that "[t]he bill avoids tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid" Id. at 23 (emphasis added). (CTS App. A23)

No inference arises from this or other statements on the subject of neutrality in the legislative history of the Act that Congress intended to preempt more restrictive state regulation of takeovers. And the references to neutrality fall far short of the "extraordinary showing of contrary intentions", Garcia, 469 U.S at ___, 105 S.Ct. at 483, that would

justify the Court in deviating from the plain language of Section 28 of the Act.

This is particularly true in view of the fact that, as this Court recognized in Piper v. Chris-Craft Industries, Inc., 430 U.S. 1 (1977), in an opinion joined in by seven Justices, the neutrality of the Williams Act is "but one characteristic of legislation directed toward a different purpose--the protection of investors." 430 U.S. at 29. Considering that under the 1934 Act the states are free to enact legislation for the protection of investors which does not conflict with its provisions, it seems apparent that Congress had no purpose in mind other than observing the principle of neutrality in its own takeover legislation.

The Seventh Circuit's opinion itself amply demonstrates that the

fundamental premise it relied upon in resolving the Supremacy Clause issue--that states may not upset the balance struck in the Williams Act--is extremely shaky. And the "weight of precedent," which was evidently the sole factor which convinced the Seventh Circuit not to "reexamine" its own analysis of this issue in sub nom. MITE Corp. v. Dixon, 633 F.2d 486 (7th Cir. 1980), rests on no firmer foundation.

Lower federal court rulings on the issue derive from the Supreme Court's plurality opinion in MITE. The three Justices constituting the plurality (Chief Justice Burger and Justices White and Blackmun) reasoned in that case that the provisions of the Williams Act, while intended primarily to protect investors, were also intended to "strike a balance between the

investor, management and the takeover bidder." 457 U.S. at 634. The plurality then held that the Illinois Act's pre-commencement notification requirement and hearing provisions upset the balance by introducing delay into the tender offer process during which the target company could take steps to combat the offer. Id. at 634-39. Further, in permitting the Illinois Secretary of State to determine whether the takeover offer was fair, and to refuse to register the offering if he determined it was not, the Illinois Act deprived investors of the right to make their own decisions on the offer as the plurality believed Congress intended. Id. at 639-40.

However, it is far from clear that the Supreme Court would have ruled the same way on the Supremacy Clause

issue in MITE had all of the Justices reached the question. Justices Powell and Stevens refused to join the Supremacy Clause portion of Justice White's opinion, Justice Powell stating that:

> [T]he Williams Act's neutrality policy does not necessarily imply a congressional intent to prohibit state legislation designed to assure--at least in some circumstances--greater protection to interests that include but often are broader than those of incumbent management. 457 U.S. at 647.

And in similar language, Justice Stevens wrote:

> I am not persuaded, however, that Congress' decision to follow a policy of neutrality in its own legislation is tantamount to a federal prohibition against state legislation designed to provide special protection for incumbent management. 457 U.S. at 655.

Justices O'Connor, Marshall, Brennan and Rehnquist did not reach the Supremacy Clause issue at all.

Because MITE was so inconclusive on the issue of the proper application of the preemption doctrine in the context of the Williams Act and state takeover statutes, there has been confusion in the lower federal courts in dealing with the issue. See, e.g., Cardiff Acquisitions, Inc. v. Hatch, 751 F.2d 906, 913 (8th Cir. 1984) ("the [Supreme] Court has not definitely resolved whether the view of Justices Powell and Stevens, the view of Justices White, Burger and Blackmun, or some other analysis should apply.") See also L.P. Acquisition Co. v. Tyson, 772 F.2d 201 (6th Cir. 1985); Agency Rent-A-Car, Inc. v. Connolly, 686 F.2d 1029, 1034, 1036 (1st Cir. 1982); and Martin-Marietta Corp. v. Bendix Corp., 690 F.2d 558, 567-68 (6th Cir. 1982). For this reason alone the Court should

give plenary consideration to the issues presented by this appeal.

E. The Indiana Statute Relates to Corporate Governance Issues which Are Not Subject to Preemption by a Federal Statute Regulating Takeover Bids.

Even if the Court were to adhere to the plurality's view in MITE concerning Congress' intent in enacting the Williams Act, the Indiana Statute would not fall afoul of its purpose. The Indiana Statute does not regulate takeover bids. It regulates only the voting rights of control shares, and is thus one of a family of other more common provisions in the Business Corporation Law affecting the relative ease of asserting influence or control over an Indiana corporation after acquiring a substantial block of shares. Such provisions include those relating to cumulative voting (e.g.,

Ind. Code Ann. § 23-1-30-9); provisions permitting the issuance of special classes of stock which can be used to give existing shareholders costly redemption rights in the event of a change of control (e.g., Ind. Code Ann. § 23-1-27-1); provisions giving dissenters in any merger appraisal rights (e.g., Ind. Code Ann. § 23-1-44-1 to -20); and provisions conditioning any merger, sale of substantially all of the assets or dissolution upon a majority vote of the shareholders. Ind. Code Ann. §§ 23-1-40-3; 23-1-41-2 and 23-1-45-2. Indeed, many states permit corporations to require a supermajority vote of shareholders (in some cases up to 80%) to approve mergers and other extraordinary corporate transactions. Del. Code Ann. tit. 8 § 102(b)(4)(Michie 1983). Unless the Seventh Circuit's

holding is reversed, state laws such as these, which relate to the degree of difficulty that an acquirer of stock might have in assuming control over a corporation, are potentially subject to attack as inconsistent with the neutrality policy underlying the Williams Act.

The Indiana Statute, dealing as it does with voting rights of an acquirer _after_ an acquisition of control shares, regulates the internal affairs of Indiana corporations. The plurality in _MITE_ considered the "internal affairs" doctrine which "recognizes that only one State should have the authority to regulate a corporation's internal affairs," 457 U.S. at 645, but held that it was of little use to Illinois in the context of that case. The tender offers regulated by the Illinois Act, the Court

ruled, "contemplate transfers of stock by stockholders to a third party and do not themselves implicate the internal affairs of the target company." Id.

The internal affairs doctrine is, however, squarely applicable in this case. As the court recognized in APL Limited Partnership v. Van Dusen Air, Inc., 622 F. Supp. 1216 (D. Minn. 1985), vacated and appeal dismissed, Nos. 85-5285/5286-MN (8th Cir. Nov. 26, 1985), while the acquisition of shares itself does not implicate the internal affairs of the target corporation, use of the power acquired as a result of the acquisition "once the shares have been acquired may well be a proper subject of state regulation . . . ." 622 F. Supp. at 1223-24 (emphasis in original).

The effect of the opinion below is to federalize a significant portion of the law relating to internal

corporate affairs in contravention of the policies this Court has followed in such cases as Cort v. Ash, 422 U.S. 66 (1975); Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 479 (1977) and Schreiber v. Burlington Northern, Inc., 472 U.S. ____, 105 S.Ct. 2458, 86 L.Ed. 2d 1 (1985). As the Court stated in an analogous context in Cort v. Ash:

> Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation. 422 U.S. at 84 (emphasis added).

If allowed to stand, henceforth new state laws (and many existing ones)*

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* See, e.g., the statutes cited in the footnote at p. 13, supra, and some of those referred to in the text at pp. 33-34, supra.

relating to corporate governance issues will be subject to attack on the ground that they are not neutral in the battle between aggressor and target for corporate control.

F. <u>The Indiana Statute Does Not Violate Any Policy of Neutrality in Takeover Contests which May Be Imposed by the Williams Act upon the States.</u>

The Indiana Statute reflects state policy that disinterested shareholders of Indiana corporations should have a voice in so fundamental a corporate event as the assumption by an acquirer of voting control over a substantial block of the corporation's stock. By preventing the acquirer and officers and inside directors from voting on the issue of whether the control shares will carry voting rights, the Statute places this decision where it belongs--in the hands of disinterested shareholders who can view

the issue from the point of view of their own self interest.

In holding that the Indiana Statute is preempted by the Williams Act, the Seventh Circuit speculated that as a practical matter the Indiana Statute imposes a fifty-day delay upon an acquirer wishing to consummate an acquisition of control shares--a reference to the period within which the corporation must hold a shareholders' meeting to consider voting rights. (CTS App. A20) There is no basis whatsoever for this conclusion.

Significantly, nothing in the Statute prevents an acquirer from making an offer to purchase control shares that entitles him to accept tendered shares as soon as permissible under the Williams Act, subject to the shares being accorded voting rights within a

specific period of time thereafter. Indeed, the offer could entitle the offeror to consummate the purchase in accordance with the Williams Act time schedule, but contain a provision that if thereafter the shares were not accorded voting rights, the acquirer would have the option to sell the shares back to the tendering shareholders at the price paid. For the offeror's protection under such circumstances, the purchase price could be placed in escrow pending the outcome of the shareholder vote.

As a matter of procedure, a tender offeror could announce a tender offer and file his acquiring person statement with the target corporation the same day. The corporation would be required to call a shareholders' meeting to be held within fifty days and to set

a record date for shareholders entitled to vote. Only shareholders of record are entitled to vote at shareholder meetings of Indiana corporations, and thus those who tendered their shares after the record date in response to the offer would be entitled to vote at the shareholders' meeting to consider the voting rights of the control shares sought. See Ind. Code Ann. § 23-1-29-7. After the waiting period which the SEC has prescribed under the Williams Act and before the shareholders' meeting, the offeror could conditionally accept (or even consummate the purchase of) all shares tendered.

Given a properly structured offer, the Indiana Statute does not delay the acceptance of the shares or the consummation of the offer and thus does not give the target company

"additional time within which to take steps to combat the offer," MITE, 457 U.S. at 635, an evil the plurality in MITE identified in the Illinois Act. Nor does the Statute require the offeror to assume any risk in the event of an adverse shareholder vote. Thus, the Seventh Circuit's conclusion that the Statute delays acceptance or consummation for at least fifty days fails to consider the practical alternatives open to the offeror.

Tender offerors and their professional advisers are undoubtedly in possession of sufficient experience to predict what price is required in given circumstances to prompt disinterested shareholders to tender their shares. It seems self evident that if the shareholder wishes to sell his shares at the price offered he will vote to confer

voting rights on the control shares sought. Thus, there is no basis for Judge Posner's speculation that the "tenderer mercies of the 'disinterested' shareholders" (CTS App. A23) will operate to frustrate tender offerors.

That the Indiana Statute in fact promotes the balance among offerors, shareholders and incumbent management in battles for corporate control is demonstrated by the fact that for the first time a state has given offerors the absolute right to obtain an immediate shareholder vote on the merits of their offers. Incumbent management is required to hold the election but cannot vote its own shares. The effect of this is likely to be that incumbent management will be less able to wage war against an offer the shareholders wish to accept. Once the disinterested

shareholders have voted in favor of an offer, management should be dissuaded from continuing to fight. It certainly would not be able to justify its actions, as many have in the past, on the ground that a tender offer is inherently coercive and that shareholders are left with no choice but to tender their shares. Under the Indiana Statute the will of the majority expressed at a shareholder meeting will control.

Finally, seen in this light, the Indiana Statute also promotes the policy, which the plurality of this Court discerned in the Williams Act, of letting shareholders make their "own informed choice." MITE, 457 U.S. at 634. Whether offerors elect to purchase control shares before or after a vote by the disinterested shareholders on the

voting rights issue, these shareholders themselves will decide the issue of whether the offer is attractive. If the offer is attractive they will undoubtedly confer voting rights.

## II. THE INDIANA STATUTE DOES NOT VIOLATE THE COMMERCE CLAUSE.

The second question on appeal to this Court is whether the Indiana Statute violates the Commerce Clause. It is significant in this regard that the Statute does not regulate commerce, but only the voting rights to be accorded to control shares acquired in Indiana corporations. As the provisions of the Statute apply whether the control shares are acquired by a resident or a non-resident and whether in intrastate or interstate commerce, it does not have even the incidental effect of discriminating against interstate

commerce. And, as this Court held in Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 675 (1981) (plurality opinion), state laws which do not discriminate against interstate commerce are entitled to "special deference."

The rights of shareholders in Indiana corporations are determined exclusively by Indiana law. Nothing in the Commerce Clause requires Indiana to resolve corporate governance issues in any particular way so long as the state does not discriminate against interstate commerce. Shares of Indiana corporations are bought and sold in interstate commerce, but whether the shares are more or less desirable to purchasers than shares of other states' corporations is irrelevant to whether the law defining the rights carried by

the shares is constitutional under the Commerce Clause.

A crucial distinction between the Indiana Statute and the Illinois Act struck down in MITE is that the latter regulated transactions in interstate commerce--tender offers for shares of corporations with substantial contacts with Illinois. The Indiana Statute does not regulate transactions, only the voting rights of shares which may be the subject of transactions. And the Seventh Circuit thus erred when it found that "[t]he law in question is an explicit regulation of tender offers." (CTS App. A27) Because Indiana has the right to determine the characteristics of shares of its corporations which are for sale in interstate commerce, the Indiana Statute is not subject to attack on Commerce Clause grounds.

If applicable at all, the test to be applied in ruling on the "dormant" Commerce Clause issue presented is that set out in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Weighing these two considerations demonstrates that the Indiana Statute was a proper exercise of the state's authority to pass laws relating to corporate governance of its domestic corporations.

A. The Burden, if any, Imposed by the Indiana Statute upon Interstate Commerce is Minimal.

It is obvious from the provisions of the Indiana Statute that

it does not prohibit interstate commerce in shares of Indiana corporations. The Statute does not affect the voting rights of shares other than control shares. Moreover, any investor purchasing control shares for investment may buy the shares and file an acquiring person statement without requesting a shareholders' meeting to determine his voting rights. While such an investor would be unable to vote the control shares acquired, he would be free to sell them to third parties. In the hands of a purchaser, the shares would carry voting rights unless that purchase was itself a control share acquisition.

The Seventh Circuit premised its Commerce Clause ruling upon a belief that the Statute impedes "commerce in corporate control." (CTS App. A26) We have demonstrated above, however, that

the Indiana Statute does not prevent an offeror from acquiring control shares on the same time table and using essentially the same procedures that have become common in contests for corporate control. The only difference is that instead of being able to obtain voting rights with respect to control shares automatically upon consummation of the tender offer, he must await the result of an expedited shareholders' meeting in which those disinterested shareholders to whom the offer is being made will decide that issue by majority vote.

There is no evidence in the record, nor any reason for concluding, that the necessity for such a shareholder vote will deter tender offers for control shares of Indiana corporations, reduce the price offered

for shares in such transactions or otherwise burden or inhibit interstate commerce in such shares. And the speculation in the Seventh Circuit's opinion to the contrary is conclusory and without any foundation. This Court, in reviewing the Seventh Circuit's decision, is free to form its own conclusions concerning the likely effect of the Indiana Statute upon interstate commerce.

In making its review, this Court should consider, as discussed above, that the Indiana Statute may well have the effect of truncating many tender offer battles between hostile aggressor and entrenched management--a result which would enhance interstate commerce in control shares. This Court may take judicial notice of the fact that bitterly fought takeover battles

often last many months. Under the Indiana Statute the aggressor is in the unique position of being able to force a shareholders' meeting and thereby take the issue directly to the shareholders on an expedited basis. In the face of a favorable vote of the shareholders on an offer or proposed offer, management should be extremely reluctant to continue the battle.

In fact, if the Statute is allowed to stand offerors may wish to adopt the strategy of filing an acquiring person statement containing the proposed offer and refraining from incurring the expense of the tender offer itself, and the accompanying litigation, until after the disinterested shareholders have spoken. After the election, the offer, which might otherwise have taken months and

consumed millions of dollars in legal and other professional fees, may be able to proceed without management opposition.

As the foregoing demonstrates, the provisions of the Indiana Statute should not hinder, and in many cases may actually facilitate, the purchase of control shares. Tender offerors and others interested in acquiring control shares for the purpose of controlling or influencing a corporation are typically sophisticated businessmen represented by experienced professionals who are capable of taking advantage of the benefits of the Indiana Statute and eliminating any delay in consummating an offer--all without incurring the risk of buying non-voting stock. This voting rights statute thus should not have been struck down for violation of the Commerce Clause, because any incidental

effect it may have on interstate commerce in control shares is minimal.

For this reason it was error on the part of the court below to hold the Statute unconstitutional on its face on Commerce Clause grounds, especially without an evidentiary hearing at which expert witnesses could testify concerning the practical effect the Statute would have on interstate commerce in control shares.

B. The Indiana Statute Effectuates a Legitimate State Interest, and Its Local Benefits Outweigh Any Incidental Burden on Interstate Commerce.

The Indiana Statute protects shareholders of Indiana corporations by permitting the majority of the disinterested shareholders to determine whether a material change in voting control of the corporation is in their best interests. In regulating this

aspect of corporate governance, the Statute is but an extension of other provisions of the Indiana Business Corporation Law which require shareholder approval of fundamental changes in the corporation, such as a merger with another corporation. Ind. Code Ann. § 23-1-40-3.

During the course of an offer the Statute permits shareholders to evaluate the offer's merits without coercion. If the offer is attractive and a majority wishes to accept it, the offeror will undoubtedly receive the voting rights sought. If, however, the offer is structured as a two-tier offer, with cash for an initial percentage of the corporation's shares and a later component of consideration of questionable value for the remaining shares (such as high risk corporate

bonds), the Indiana Statute permits shareholders to evaluate the merits of the whole without being stampeded into accepting the offer for the initial shares.

Moreover, the Indiana Statute permits shareholders to evaluate the intentions of the offeror to determine whether one seeking a controlling block of the shares will use his voting power in the best interests of the minority shareholders. Whether a shareholder's interests are served by accepting an offer which may result in the purchase of less than all of his shares depends upon how the new controlling shareholder will run the business and whether he will abuse his ability to control the corporation.

Finally, Indiana has a strong local interest in the welfare of

employees of Indiana corporations with headquarters in the State. The Statute permits shareholders to determine the intentions of any offeror concerning the liquidation of the company or its removal from the State. If so inclined, the shareholder may vote against conferring voting control on the control shares in an effort to prevent drastic changes in the conduct of the business which would adversely affect Indiana. See, e.g., Cardiff Acquisitions, Inc. v. Hatch, 751 F.2d 906, 912 (8th Cir. 1985) (recognizing that a requirement of Minnesota law that a tender offeror provide information as to the "impacts on the state or its residents of the takeover" was a local benefit because shareholders may wish to take these matters into consideration in deciding whether to tender their shares).

It is noteworthy that the Indiana Statute is far more discriminating in its application than the Illinois Act struck down in MITE. The Statute applies only to corporations organized under the laws of Indiana. Thus, It does not purport to regulate foreign corporations doing business in Indiana, and there is no risk of overlap with the laws of another state which might require offerors to comply with conflicting laws of sister states in proceeding with a tender offer.

The fact that shareholders residing outside of Indiana, as well as those residing within the State, will benefit from the provisions of the Indiana Statute is no reason to hold that local benefits do not outweigh any incidental effect on interstate commerce. The Statute refrains from

regulating the voting rights of control shares unless at least 10% of the shares of tne corporation are held by Indiana residents, 10% of the shareholders are Indiana residents or 10,000 shareholders reside in Indiana. These threshold percentages ensure that the Statute confers local benefits sufficient to survive any Commerce Clause challenge in view of the fact that it should have only a minimal effect on interstate commerce.

The Indiana Statute is thus unlike state takeover statutes which have been struck down for violation of the Commerce Clause because the statutes did not require that any shareholders reside within the state. _See Mesa Petroleum Co. v. Cities Service Co._, 715 F.2d 1425 (10th Cir. 1983); _APL Limited Partnership v. Van Dusen Air, Inc._, 622

F. Supp. 1216 (D. Minn. 1985), vacated and appeal dismissed, Nos. 85-5285/5286-MN (8th Cir. Nov. 26, 1985); Icahn v. Blunt, 612 F. Supp. 1400 (W.D. Mo. 1985).

## CONCLUSION

Because the federal constitutional issues on this appeal present substantial questions for resolution, this Court should note probable jurisdiction over the appeal and set the case for plenary consideration.

July 22, 1986.

Respectfully submitted,

John F. Pritchard
Counsel of Record for
Intervenor-Appellant

APPENDIX

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NOTE: Other referenced documents are found in the Appendix submitted in connection with the Jurisdictional Statement of Appellant CTS Corporation

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

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NO. 86-1601

---

DYNAMICS CORPORATION OF AMERICA,

Plaintiff-Appellee,

v.
CTS CORPORATION, et al.,

Defendants-Appellants;

and STATE OF INDIANA,
Intervenor-Appellant.

Appeal from the United
States District Court
for the Northern District
of Illinois, Eastern
Division

No. 86-C-1624

The Honorable Susan
Getzendanner, Judge.

NOTICE OF APPEAL TO SUPREME COURT OF THE UNITED STATES BY INTERVENOR-APPELLANT STATE OF INDIANA

Pursuant to 28 U.S.C. §1254(2) and Rule 10 of the United States Supreme Court, Intervenor-appellant State of Indiana hereby gives notice of appeal to the Supreme Court of the United States of the judgment of the United States Court of Appeals for the Seventh Circuit entered on April 23, 1986.

The portion of the judgment being appealed from is the holding Indiana Code Chapter 23-1-42, dealing with control share acquisitions, is unconstitutional under the Supremacy Clause, Article VI, clause 2, and the Commerce Clause, Article I, §8, clause 3, of the Constitution of the United States.

This appeal is taken under 28

U.S.C. §1254(2).

Respectfully submitted,

Attorney General of Indiana

/s/ Arthur Thaddeus Perry
Arthur Thaddeus Perry
Deputy General

Offices of the Attorney General
219 State House
Indianapolis, IN 46204
Telephone: (317) 232-8068

[U.S.C.A. -7th Circuit
RECEIVED
April 28, 1986
Thomas F. Strubbe
clerk]

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

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NO. 86-1601

---

DYNAMICS CORPORATION OF AMERICA,

Plaintiff-Appellee,

v.

CTS CORPORATION, et al.,

Defendants-Appellants;

and STATE OF INDIANA,
Intervenor-Appellant.

Appeal from the United
States District Court
for the Northern District
of Illinois, Eastern
Division

No. 86-C-1624

The Honorable Susan
Getzendanner, Judge.

PROOF OF SERVICE

I, William E. Daily, a member of the Bar of the Supreme Court of the United States and of the Bar of this Court certify pursuant to rules 10 and 28.5(b) of the United States Supreme Court that I served a true and exact copy of Notice of Appeal to Supreme Court of the United States of Intervenor-Appellant State of Indiana by mail under Supreme Court Rule 28.3 on all counsel of record in this case, addressed to:

Mr. Lowell Sachnoff
Sachnoff, Weaver, & Rubenstein
30 South Wacker Drive
Chicago, IL 60606

Mr. Thomas A. Withrow
Henderson, Daily, Withrow & DeVoe
2450 One Indiana Square
Indianapolis, IN 46204

Mr. Stephen C. Sandels
McDermott, Will & Emery
111 West Monroe Street
Chicago, IL 60603

Mr. Richard E. Deer
Barnes & Thornburg
1313 Merchants bank Bldg.
Indianapolis, IN 46204

this 25th day of April, 1986.

/s/ William E. Daily
William E. Daily

Offices of the Attorney General
219 State House
Indianapolis, IN 46204
Telephone: (317) 232-8068

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

---

NO. 86-1601

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DYNAMICS CORPORATION OF AMERICA,

Plaintiff-Appellee,

v.

CTS CORPORATION, _et al_.,

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Intervenor-Appellant.

Appeal from the United
States District Court
for the Northern District
of Illinois, Eastern
Division

No. 86-C-1624

The Honorable Susan
Getzendanner, Judge.

MOTION TO INTERVENE OF STATE OF INDIANA

Comes now the State of Indiana, by its counsel, Linley E. Pearson, by his Deputy, Arthur Thaddeus Perry, and respectfully moves the Court for leave to intervene as an Appellant in this cause, saying:

1. The District Court has declared a statute of the State of Indiana unconstitutional.

2. At the same time the District Court entered its decision on April 16, 1986, it certified the case to the Attorney General of Indiana pursuant to 28 U.S.C. §2403.

3. The State of Indiana desires to exercise its right to intervene in defense of its statute.

4. On April 17, 1986, undersigned counsel was informed by Mr.

Schroeder of the Clerk's Office that should the State desire to intervene, it could do so and and have until noon on Saturday, April 19, 1986, to file its brief.

5. The State's Brief is being filed simultaneously with the filing of this Motion.

WHEREFORE, the State of Indiana respectfully prays the Court for leave to intervene as a party appellant in this expedited appeal.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

/s/ Arthur Thaddeus Perry
Arthur Thaddeus Perry
Deputy Attorney General

Attorneys for Intervenor
State of Indiana

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a true and exact copy of the foregoing pleading on all counsel of record in this case, either personally on the 19th, or by mail on the 18th, day of April, 1986.

/s/ Arthur Thaddeus Perry
Arthur Thaddeus Perry

Offices of the Attorney General
219 State House
Indianapolis, IN 46204
Telephone: (317) 232-8068

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

April 22, 1986.

By the Court:

DYNAMICS CORPORATION OF AMERICA,
a New York Corporation,
Plaintiff-Appellee,

No. 86-1601
v.
CTS CORPORATION, an Indiana
corporation, ROBERT D. HOSTETLER,
GARY B. EREKSON and
JOSEPH DiGIROLAMO,
Defendants-Appellant,
and
STATE OF INDIANA,
Intervenor-Appellant.

Appeal from the United States
District Court for the
Northern District of Illinois,
Eastern Division.

No. 86 C 1624
Susan Getzendanner, Judge

This matter comes before the court for its consideration of the "MOTION TO INTERVENE OF STATE OF INDIANA" filed herein on Apeil (sic) 19, 1986.

On consideration thereof,

IT IS ORDERED that the "MOTION TO INTERVENE OF STATE OF INDIANA" is GRANTED and the State of Indiana may participate in this appeal as an intervening appellant.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

April 18, 1986.

By the Court:

DYNAMICS CORPORATION OF AMERICA,
a New York Corporation,
Plaintiff-Appellee,

No. 86-1601
v.
CTS CORPORATION, an Indiana
corporation, ROBERT D. HOSTETLER,
GARY B. EREKSON and
JOSEPH DiGIROLAMO,
Defendants-Appellant,
and
STATE OF INDIANA,
Intervenor-Appellant.

Appeal from the United States
District Court for the
Northern District of Illinois,
Eastern Division.

No. 86 C 1624
Susan Getzendanner, Judge

On the Court's own motion:

1. These appeals are hereby CONSOLIDATED for purposes of briefing and argument.

2. Appellant's requests for expedited appeal are GRANTED. Briefing shall proceed as follows:

a) Appellants' brief shall be filed by 5:00 p.m. on Friday, April 18, 1986.

b) The brief of the Indiana Attorney General, intervenor-appellant, shall be filed by 12:00 noon on Saturday, April 19, 1986.

c) Appellee's brief shall be filed by 1:00 p.m. on Monday, April 21, 1986.

d) Appellants' reply brief, if any, shall be filed by 1:00 p.m. on Tuesday, April 22, 1986.

All briefs must be delivered to the clerk of this court and to counsel by the times and dates specified. Intervenor-appellant may address reply arguments to the court at the time this case is argued.

3. Oral argument in this case will be held on Wednesday, April 23, 1986 at 10:00 a.m., limited to 30 minutes per side. Counsel for appellant and intervenor-appellant should confer on how they wish to divide their time and advise the court of their decision on this matter by April 22, 1986 at 1:00 p.m.

(3) (3)

Nos. 86-71 & 86-97



IN THE

# Supreme Court of the United States

OCTOBER TERM 1986

CTS CORPORATION,

*Appellant,*

*v.*

DYNAMICS CORPORATION OF AMERICA,

*Appellee.*

STATE OF INDIANA,

*Intervenor-Appellant,*

*v.*

DYNAMICS CORPORATION OF AMERICA,

*Appellee.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## MOTION OF APPELLEE DYNAMICS CORPORATION OF AMERICA TO AFFIRM

LOWELL E. SACHNOFF
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39 pp

## QUESTION PRESENTED

Whether the unanimous decision of the Seventh Circuit Court of Appeals forbidding appellant CTS Corporation ("CTS") from applying the Control Share Chapter of the Indiana Business Corporation Law to the tender offer of appellee Dynamics Corporation of America ("DCA") should be summarily affirmed when:

1. The Chapter allows the management of Indiana corporations to delay tender offers for three weeks beyond the period mandated by the Williams Act and it was impossible for DCA's tender offer to comply with the Chapter even though it satisfied all federal requirements;

2. The Chapter insulates Indiana corporations from the interstate market for corporate control, directly regulates transactions between nonresidents and its burden on interstate commerce far outweighs any local benefits; and

3. *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), is dispositive of this case and has provided clear guidance to lower courts considering similar anti-takeover statutes.

## PARTIES TO PROCEEDINGS BELOW

In the Seventh Circuit No. 86-1601, which involved the constitutional questions presented by this appeal, the parties in the Seventh Circuit were: DCA, as plaintiff-appellee; CTS, Robert Hostetler, Gary Erekson and Joseph DiGirolamo (officers and/or directors of CTS) as defendants-appellants; and the State of Indiana ("Indiana") as intervenor-appellant.

Seventh Circuit No. 86-1608 involved the same action in the District Court, was consolidated with No. 86-1601, but did not involve the constitutional questions presented by the present appeal. The parties were: DCA, Andrew Lozyniak, Edward J. Mooney, Henry V. Kensing, Patrick J. Dorme, Frank A. Gunter, Curtis T. Roff, Saul Sperber, Joseph P. Walker and Harold Cohan (officers and/or directors of DCA) as plaintiffs-appellees; and CTS, Robert D. Hostetler, Gary B. Erekson, Joseph DiGirolamo, George F. Sommer, Gerald H. Frieling, Jr., Don J. Kacek, Ted Ross and Richard M. Ringoen (officers and/or directors of CTS) as defendants-appellants.

*Rule 28.1 Listing.* Appellee DCA has no parent corporation, non-wholly owned subsidiaries, or affiliates.

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## TABLE OF AUTHORITIES CITED

*Cases*

*Other Authorities*

IN THE

# Supreme Court of the United States

OCTOBER TERM 1986

CTS CORPORATION,

*Appellant,*

*v.*

DYNAMICS CORPORATION OF AMERICA,

*Appellee.*

STATE OF INDIANA,

*Intervenor-Appellant,*

*v.*

DYNAMICS CORPORATION OF AMERICA,

*Appellee.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## MOTION OF APPELLEE DYNAMICS CORPORATION OF AMERICA TO AFFIRM

### CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED

This case involves the following constitutional provisions and statutes:

1. The Supremacy Clause, U.S. Const. art. VI, cl. 2.

2. The Commerce Clause, U.S. Const. art. I, § 8, cl. 3.

3. The Williams Act amendments to the Securities Exchange Act of 1934, 15 U.S.C. §§ 78m(d)-(c), 78n(d)-(f).

4. The Control Share Acquisitions Chapter of the Indiana Business Corporation Law, Ind. Code Ann. §§ 23-1-42-1 to -11 (Burns Cum. Supp. 1986).

## PRELIMINARY STATEMENT

### I. CTS OPTED INTO THE CONTROL SHARE CHAPTER TO DEFEAT DCA'S TENDER OFFER AND PROXY CAMPAIGN

This appeal arises out of an all-out effort by the current management and directors (collectively "management") of appellant CTS Corporation ("CTS") to preserve their control over CTS in the face of a challenge to their hegemony by appellee Dynamics Corporation of America ("DCA"). At issue is the preservation of the interstate market for corporate control from a protectionist piece of state legislation that conflicts directly with the timing requirements and investor protection purpose of the Williams Act, 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f). In striking down CTS' application of the Control Share Acquisitions Chapter of the Indiana Business Corporation Law, Ind. Code § 23-1-42-1 *et seq.* ("Control Share Chapter" or "Chapter") to DCA's tender offer, the Seventh Circuit consistently applied this Court's precedents. Its decision should be summarily affirmed, because *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) is dispositive and the unique circumstances of this case make it an inappropriate vehicle for plenary review.

On March 10, 1986, DCA, then CTS' largest shareholder, commenced a tender offer for 1,000,000 additional shares of CTS stock. The offer was designed to expire on April 10, 1986, twenty business days later. DCA also announced a proxy solicitation campaign to elect its slate of nominees to the CTS Board of Directors at the April 25, 1986 Annual Meeting ("Annual Meeting"). Voting the 1,000,000 shares it would acquire in its tender offer was a key part of DCA's election strategy.

CTS vigorously attempted to block DCA's tender offer and proxy solicitation from the date they were announced.[1] CTS has not denied that it rushed to adopt the Control Share Chapter on

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[1] Among other things CTS (1) invoked the Indiana Business Take-over Offers Act, Ind. Code § 23-2-3.1 *et seq.*, by requesting a

*(Footnote continued on following page)*

March 27, 1986 for that purpose.[2] On March 31, 1986, CTS announced its adoption of the Chapter and stated that it intended to use the Chapter to strip the voting rights from the shares DCA acquired through its tender offer. (App. 85) CTS also stated in filings with the District Court that it would not hold a special shareholders meeting on the voting rights issue before the Annual Meeting, thus making it futile for DCA to attempt to satisfy the requirements of the Chapter. (App. 84)

As intended, CTS' actions directly and adversely affected DCA's tender offer and proxy campaign. On the one hand, DCA's tender offer made no economic sense if DCA could not vote at the Annual Meeting the tendered shares—for which DCA had offered a substantial premium—in favor of its slate of directors. On the other hand, CTS' hasty adoption of the

*(Footnote continued from preceding page)*

hearing before the Indiana Securities Commissioner and filing an action in Indiana state court seeking to halt DCA's tender offer; (2) filed numerous counterclaims seeking to enjoin DCA's tender offer and proxy solicitation on the grounds that, *inter alia,* DCA's disclosures were misleading and seating DCA's nominees on the CTS Board would violate Section 8 of the Clayton Act, 15 U.S.C. § 19; (3) adopted in succession two "poison pill" shareholder rights plans designed to thwart DCA's tender offer and proxy solicitation; and (4) issued false and misleading communications in connection with its adoption of the second poison pill. The District Court, Seventh Circuit and Indiana Securities Commissioner have rejected all of CTS' defensive measures except for the second poison pill, the legality of which is now on appeal before the Seventh Circuit.

[2] The Control Share Chapter is part of the revised Indiana Business Corporation Law, Ind. Code §§ 23-1-17-1 to 23-1-54-2 (Burns Cum. Supp. 1986), and is attached in the Appendix along with other pertinent statutory provisions. Indiana corporations were permitted to adopt the Business Corporation Law after April 1, 1986. § 23-1-17-(b)(2). Corporations adopting the Business Corporation Law may exempt themselves from the Control Share Chapter. § 23-1-42-5. CTS was the first Indiana corporation to adopt the Business Corporation Law and in its haste filed two notices with the Indiana Secretary of State. (App. 86-89)

Chapter after DCA announced its tender offer and CTS' refusal to hold a prompt special shareholders meeting on the voting rights issue made it impossible for DCA's tender offer to satisfy the requirements of the Chapter even though it complied fully with the Williams Act. This dilemma left DCA with no alternative but to halt both its tender offer and proxy campaign until April 23, 1986, when the Seventh Circuit affirmed the District Court's declaratory judgment that CTS could not apply the Chapter to DCA in connection with DCA's tender offer. DCA promptly purchased 1,000,000 of the tendered shares.

## II. THE CONTROL SHARE CHAPTER IS A POWERFUL PRO-MANAGEMENT WEAPON DESIGNED TO DEFEAT TENDER OFFERS

### A. The Operation of the Chapter

Once a corporation has opted into the Control Share Chapter its management automatically strips the voting rights from the shares ("control shares") acquired by a party whose total holding of common stock will exceed certain ownership thresholds beginning as low as 20%. § 23-1-42-1. Voting rights can be reattached to the control shares *only* on the basis of a convoluted process which is completely controlled by management. Management is solely responsible for preparing, presenting to shareholders and taking a position on a voting rights resolution, § 23-1-42-8, and voting rights can be reattached "only to the extent granted by [this] resolution," § 23-1-42-9(a). If the resolution fails, management can redeem the acquiror's shares in a process and at a valuation wholly under its control. § 23-1-42-10(b).

This process presents the acquiror with a Hobson's choice. If the acquiror files an "acquiring person statement," § 23-1-42-6, majorities of at least two different shareholder groups must approve management's voting rights resolution:

(1) each voting group entitled to vote separately on the proposal by a majority of all the votes entitled to be cast by that voting group . . .; *and*

(2) each voting group entitled to vote separately on the proposal by a majority of all the votes entitled to be cast by that group, excluding all interested shares.

Ind. Code § 23-1-42-9(b) (emphasis added).[3]

Once a party has filed an acquiring person statement, management has fifty days to present its voting rights resolution to the shareholders. § 23-1-42-7(b). Management is not required to hold a special shareholders meeting before the scheduled expiration of a tender offer and the Chapter does not allow a tender offeror to accelerate the meeting. The Chapter only allows the tender offeror to ensure that the special meeting "not be held *sooner* than thirty days" after the acquiring person statement is filed. § 23-1-42-7(d) (emphasis added).

Alternatively, the acquiror may choose not to file an "acquiring person statement," in which case it is faced with the other prong of the Hobson's choice. The acquiror who does not file an acquiring person statement is at the mercy of management, which may redeem its shares "pursuant to procedures adopted by the corporation," § 23-1-42-10(a), and may delay shareholder consideration of a voting rights resolution until the next annual meeting, § 23-1-42-7(c).

The Control Share Chapter comes into play even if the tender offeror, the management of the target company and 90% of the target company's shareholders are nonresidents. § 23-1-

[3] In control share transactions that implicate §23-1-38-4(a) of the Indiana Business Corporation Law, more than two voting groups must approve the voting rights resolution. *See* §23-1-42-9(b)(1). Appellants' self-serving interpretation of §23-1-42-9(b), CTS Br. at 5 n.3, Indiana Br. at 20 n.*, is contrary to its plain language and the interpretations of the District Court, CTS App. 38-39, the Seventh Circuit, Slip. op. at 20, and other courts that have considered similar requirements, *see Fleet Aerospace Corp. v. Holderman*, No. C-2-86-0556 (S.D. Oh. June 11, 1986), Slip. op. at 12, *aff'd* Fed. Sec. L. Rep. (CCH) ¶92,800 (6th Cir. June 25, 1986) (App. 103); *Icahn v. Blunt*, 612 F. Supp. 1400, 1406-1407 (W.D. Mo. 1985).

42-4(b). The Chapter thus permits the out-of-state management of an Indiana corporation to strip the voting rights from shares tendered by out-of-state shareholders to an out-of-state acquiror in response to a nationwide tender offer that complies with federal law. To the extent the Chapter deters tender offers, it chills a myriad of potential securities transactions with and between nonresidents.

The extraterritorial reach of the Control Share Chapter is especially evident in this case. CTS is an Indiana corporation and DCA is a New York corporation headquartered in Connecticut. Both companies are publicly owned and their stock is traded on the New York Stock Exchange. Approximately two-thirds of the CTS shareholders reside outside of Indiana. Transcript of Proceedings, March 28, 1986, pg. 56. (App. 91)

**B. The Chapter Falls Most Heavily on Tender Offers**

The market for corporate control allows parties who can make more efficient and profitable use of a company's resources to obtain control over the company.[4] The propensity of management to resist value-maximizing corporate control transactions is well-known. *See generally* Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer,* 94 Harv. L. Rev. 1161 (1981). Tender offers are the most common method used by a party to obtain control of a company whose management has not made efficient use of corporate assets, thereby diminishing shareholder wealth. Tender offers are extended directly to the shareholders, allowing acquirors to sidestep entrenched management and take their case for a change in control directly to the shareholders.

It is evident that the Control Share Chapter was designed to be used against tender offers that are opposed by incumbent

[4] This market is extremely large. In 1985 there were 3,001 corporate control transactions of $500,000 or more. 3 *Corporate Control Alert* 1 (April 1986). (App. 143) The total purchase price of these transactions was $179.6 billion. *Id.* at 9. (App. 144)

management. *First,* by stripping away voting rights, the Chapter falls much more harshly on tender offerors, who always buy shares for their voting rights, than upon other acquirors, who typically buy stock for investment purposes. The value of voting rights to tender offerors is reflected in the high premiums they pay to shareholders.[5] *See generally* Jensen & Ruback, *The Market for Corporate Control: The Scientific Evidence,* 11 J. Fin. Econ. 5 (1983) (collecting studies showing that shareholders reap high premiums from changes in corporate control).

*Second,* by stripping away the voting rights from only the block of shares which puts the holder over an ownership threshold, §§ 23-1-42-2, -9(a), the Control Share Chapter once again most affects tender offerors, who unlike other acquirors invariably purchase substantial blocks of shares.

*Third,* the delay built into the Chapter is far more prejudicial to tender offerors than to persons who acquire control shares solely for investment purposes. The Chapter allows management to delay a special shareholders meeting on the voting rights issue for fifty days, in practical terms forcing tender offerors to delay completion of tender offers for over three weeks beyond the twenty business day (approximately 28 calendar day) period mandated by regulations under the Williams Act, 17 C.F.R. § 240.14e-1(a). This three week delay gives management ample time to install defensive measures ("poison pills," sale of "crown jewels," "lock-ups," "pac-man" defenses, self-tenders, etc.), to search for a "white knight" acquiror, and to give themselves lucrative severance benefits. *See* Langevoort, *State Tender-Offer Legislation: Interests, Effects and Political Competency,* 62 Cornell L. Rev. 213, 238 (1977) (delay is "the most potent weapon in a tender offer fight").

*Fourth,* the byzantine pro-management provisions of the Control Share Chapter give hostile management an *additional*

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[5] "The most important shareholder right is the right to cast votes, equal to the number of shares he holds, for membership in the corporation's board of directors." R. Posner, *Economic Analysis of Law* 302 (2d. ed. 1977).

powerful weapon to oppose tender offers. Management already can oppose a tender offer on the merits, in communications with shareholders required under the Williams Act, 17 C.F.R. § 240. 14d-9(f), and by resorting to an arsenal of potent legal weapons under federal securities laws.[6] In sharp contrast, management has no comparable regulatory scheme to deploy in conjunction with the Chapter against other types of control share transactions.

*Fifth,* the application of the Control Share Chapter to tender offers has far-reaching effects on all shareholders, each of whom is a tender offeree. In contrast, other control share transactions typically involve only the acquiror and a transferee.

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[6] Entrenched management can also utilize the antitrust laws, the common law and other state and federal causes of action as well as implement defensive measures like poison pill shareholder rights plans that may be authorized under state law. The new Indiana Business Corporations Law expressly authorizes the management of Indiana corporations to adopt defensive measures against corporate takeovers without shareholder approval. Ind. Code §23-1-22-4.

## ARGUMENT

### III. THE CONTROL SHARE CHAPTER IS PREEMPTED BY THE WILLIAMS ACT

The Control Share Act is preempted because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the Williams Act. *Hines v. Davidowitz,* 312 U.S. 52, 67-68 (1941). The Chapter is also preempted in this case because it was impossible for DCA's tender offer to comply with its provisions even though it satisfied all of the requirements of the Williams Act. *See Florida Lime and Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-43 (1963).

#### A. The Williams Act Embodies a Policy of Neutrality Between Tender Offerors and Management

This Court has already exhaustively examined the legislative history of the Williams Act and concluded that Congress "expressly embraced a policy of neutrality" between tender offerors and the management of target companies. *MITE,* 457 U.S. at 633. In enacting the Williams Act:

> . . . Congress intended to strike a balance between the investor, management, and the takeover bidder. The bidder was to furnish the investor and the target company with adequate information but there was no intention to do more than give incumbent management an opportunity to express and explain its position. Once that opportunity was extended, Congress anticipated that the investor, if he so chose, and the takeover bidder should be free to move forward within the time frame provided by Congress.

*MITE,* 457 U.S. at 634 (citation and quotation omitted); *see also Schreiber v. Burlington Northern, Inc.,* 472 U.S. ____, 105 S. Ct. 2458, 2463, 86 L.Ed. 2d. 1, 8 (1985) ("The expressed legislative intent was to preserve a neutral setting in which the contenders could fully present their arguments."); *Great Western United Corp. v. Kidwell,* 577 F.2d 1256, 1276-1281 (5th Cir.

1978), *rev'd on venue grounds sub. nom. Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979).[7]

This policy of neutrality is "a major aspect of the effort to protect the investor," *MITE*, 457 U.S. at 633, and complements the disclosure requirements and other investor protections of the Williams Act. Congress recognized the salutary effects of tender offers and "expressly disclaimed an intention to provide a weapon for management to discourage takeover bids or prevent large accumulations of stock which would create the potential for such attempts." *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1979).

**B. The Chapter Conflicts Directly With the Williams Act**

Like the anti-takeover statute struck down in *MITE*, the chief vice of the Control Share Chapter is the delay it injects in the tender offer process. The Chapter allows management to delay a special shareholders meeting on the voting rights issue for fifty days. The Williams Act permits the tender offeror to close a tender offer after twenty business (28 calendar) days. No rational tender offeror, however, will buy shares until the voting rights issue is settled. The Chapter thus prevents tender offerors from completing timely tender offers that satisfy all the requirements of the Williams Act as surely as a flat prohibition against completing tender offers in less than fifty days.

[7] Contrary to CTS' argument (CTS Br. at 14-16), *Piper v. Chris-Craft Industries*, 430 U.S. 1 (1977), where this Court refused to grant tender offerors an implied cause of action under §14(e) of the Williams Act, is fully consistent with this policy of neutrality. This Court correctly recognized that giving tender offerors an implied cause of action under §14(e) would undermine the policy of neutrality by giving tender offerors a new and powerful weapon that would impermissibly tilt the balance in their favor in contests for corporate control. *See also Schreiber v. Burlington Northern, Inc.*, 472 U.S. _____, 105 S. Ct. 2458, 2464, 86 L.Ed.2d. 1, 10 (1985)(limiting scope of §14(e) to avoid "inject[ing] uncertainty in the tender offer process").

A more direct conflict between federal and state regulatory schemes can hardly be imagined, especially since Congress in drafting the Williams Act recognized that delay deters wealth-maximizing tender offers by giving entrenched management more time to implement defensive measures. Congress thus rejected proposed precommencement notification requirements that would have delayed tender offers for *shorter* periods than under the Control Share Chapter. *See MITE,* 457 U.S. at 635-38.

Less dramatically, but just as effectively, the other burdensome and pro-management requirements of the Control Share Chapter also frustrate the investor protection objective of the Williams Act. By subjecting tender offers to the approval of at least two shareholder groups, the Chapter interferes with the individual shareholder's right to make its own decision whether to tender. *See MITE,* 457 U.S. at 639 ("Congress intended for investors to be free to make their own decisions."); *Fleet Aerospace Corp. v. Holderman,* No. C-2-86-0556, slip op. at 22-23 (S.D. Oh. June 11, 1986), *aff.'d* Fed. Sec. L. Rep. (CCH) ¶ 92,800 (6th Cir. June 25, 1986). (App. 113-14) The shareholder approval process also superimposes a proxy contest on the tender offer. Management can exploit the proxy rules to delay tender offers beyond fifty days,[8] while the high costs of a proxy contest deter tender offers altogether. *Id.* at 21-22. (App. 112-13)

CTS and Indiana argue implausibly that the Congressionally mandated policy of neutrality places no limits on the power of the states to implement restrictive anti-takeover laws that severely disadvantage tender offerors. Their inverted view of federalism, however, was repudiated by *MITE* and totally ignores the clear conflict between the specific timing require-

[8] If management delays a tender offer for only ten additional days, under the Williams Act shareholders obtain withdrawal rights whose exercise will scuttle a tender offer altogether. *See* 15 U.S.C. § 78d(5).

ments under the Williams Act and the lengthy delay built into the Control Share Chapter.[9]

### C. The Control Share Chapter Imposes Conflicting Obligations on DCA and Other Tender Offerors

DCA's tender offer could not comply with the Control Share Chapter even though it satisfied all the Williams Act requirements. Where it is impossible for a party to comply with both state and federal laws, the state law is preempted in favor of the federal requirements. *Florida Lime and Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-43 (1963).

DCA's tender offer was scheduled to close on April 10, 1986, twenty business days after it was announced. DCA intended to vote the shares it acquired for its slate of director nominees at the Annual Meeting. As both the District Court and Seventh Circuit found, DCA's tender offer complied with all the requirements of the Williams Act.

It was not until *after* DCA announced its tender offer that CTS rushed to embrace the Control Share Chapter. It chose not to hold a special shareholders meeting on the voting rights issue until after both the date DCA's tender offer expired and the Annual Meeting. CTS apparently intended to wait a full fifty days to present its voting rights resolution. Had DCA waited the fifty days, it would have been forced to extend an otherwise lawful and heavily oversubscribed tender offer and been unable to vote any of the tendered shares on behalf of its director slate at the Annual Meeting.

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[9] Section 28(a) of the Securities Exchange Act ("Exchange Act"), 15 U.S.C. § 78bb(a), which simply restates the Supremacy Clause by stating that state laws not in conflict with the Exchange Act are not preempted, is not to the contrary. Section 28 was enacted to preserve state blue sky laws and was passed decades before tender offers became common, the Williams Act had been passed, and states had begun to insulate local companies against takeovers. *See generally Great Western United Corp. v. Kidwell, supra.,* 577 F.2d at 1271, 1275-76.

Indiana's argument that future tender offerors can avoid such problems by substantially lengthening or heavily conditioning their tender offers (Ind. Br. at 40-43) is irrelevant.[10] This appeal concerns only CTS' application of the Control Share Chapter to DCA's tender offer, which made it impossible for the tender offer to comply with the Chapter even though it met all federal requirements.

The Control Share Chapter presents *all* tender offerors with another impossible dilemma. The Williams Act regulations require a tender offeror to make its offer effective within five days of publicly announcing the material terms. 17 C.F.R. § 240.14d-2(b). An acquiring person statement under the Control Share Chapter undoubtedly constitutes a public announcement of a tender offer. *See* 17 C.F.R. § 240.14d-2(b)-(c). On the one hand, the tender offeror can go ahead with a tender offer even though five days is insufficient time to hold a special shareholders meeting on the voting rights issue. A tender offer, however, makes no economic sense if the tendered shares will be stripped of their voting rights. And to protect their own voting rights against dilution, shareholders have every incentive *not* to grant voting rights to the acquiror. On the other hand, the tender offeror can avoid making a tender offer for shares of the Indiana corporation altogether even though a change in corporate control and the installation of new management would be in the best economic interests of both the tender offeror and the shareholders of the target company.

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[10] In describing the convoluted steps tender offerors can take to satisfy both federal and state requirements, Indiana, albeit unwittingly, concedes that the Control Share Chapter has a direct and substantial impact on tender offers and is far from the innocuous regulation of voting rights that it characterizes the Chapter elsewhere in its brief.

## IV. THE CONTROL SHARE CHAPTER VIOLATES THE COMMERCE CLAUSE

The Control Share Chapter is per se violative of the Commerce Clause because it is designed to insulate Indiana companies from the market for corporate control, has a discriminatory effect on interstate commerce, and directly regulates economic transactions between out-of-state shareholders and tender offerors. The Chapter also violates the Commerce Clause because its burden on interstate commerce greatly outweighs its putative local benefits.

### A. The Chapter is Designed to Discriminate Against Interstate Commerce

State statutes that are designed to isolate local interests from interstate markets are per se violative of the Commerce Clause. *See Philadelphia v. New Jersey,* 437 U.S. 617, 624 (1978). The Control Share Chapter is silent as to its purposes but this Court need not speculate about those purposes. Counsel of record for CTS has flatly stated that the Chapter is *intended* to insulate Indiana corporations from the interstate market for corporate control by deterring nonresidents from acquiring control of Indiana corporations:

> When asked why Indiana had decided to adopt such a virulent statute [the Control Share Chapter], James Strain, an Indianapolis corporate lawyer from Barnes and Thornburg says, "We don't like having all our companies taken over by East Coast firms." On further reflection, Strain says Midwestern and West Coast acquirors are no better.

3 *Corporate Control Alert* 1, 10 (March 1986). (App. 141) Appellants have adduced no evidence to the contrary. In fact, Indiana concedes that the Chapter is a "regulation of [corporate] takeovers." (Ind. Br. at 28)

The circumstances of Indiana's adoption of the Control Share Chapter highlight its illegitimacy. The Chapter was

passed in response to bids by nonresidents for two large Indiana corporations. 3 *Corporate Control Alert* 1, 10-11 (March 1986) (App. 141-42). The Chapter also comes in the context of a determined effort by some states to circumvent *MITE* with a new wave of anti-takeover legislation. *See generally* Block, Barton & Roth, *State Takeover Statutes: The "Second Generation,"* 13 Sec. Reg. L. J. 332 (1986). (App. 145) The most common "second generation" anti-takeover legislation has been control share acquisition statutes similar to Indiana's in both operation and effect. *Id.* Such statutes have been stricken by every court to have considered their constitutionality. *See Fleet Aerospace Corp. v. Holderman,* Fed. Sec. L. Rep. (CCH) ¶ 92,800 (6th Cir. June 25, 1986) (Ohio statute); *Terry v. Yamashita,* Fed. Sec. L. Rep. (CCH) ¶ 92,845 (D. Haw. June 13, 1986) (Hawaii statute); *APL Limited Partnership v. Van Dusen Air, Inc.,* 622 F. Supp. 1216 (D. Minn. 1985), *vacated on other grounds and appeal dismissed,* Nos. 85-5285/5286-MN (8th Cir. November 26, 1985) (Minnesota statute); *Icahn v. Blunt,* 612 F. Supp. 1400 (W.D. Mo. 1985)(Missouri statute).

**B. The Chapter Has A Discriminatory Effect On Interstate Commerce**

A state statute is per se violative of the Commerce Clause if it has a discriminatory effect on interstate commerce. *See Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263 (1984). This Court has repeatedly emphasized that in Commerce Clause cases "[t]he principal focus of inquiry must be the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects." *Lewis v. BT Investment Managers, Inc.,* 447 U.S. 27, 37 (1980).

Appellants would have this Court consider the Control Share Chapter in a vacuum, ignoring its practical effect of discrimination against interstate commerce. Because of the distribution of financial resources in this country the large

majority of tender offers for Indiana corporations will come from out-of-state bidders and will be addressed to a sizeable majority of out-of-state shareholders. Thus, by placing a major obstacle in the way of tender offers, the Chapter inevitably disrupts the flow of interstate commerce in the market for corporate control and disproportionately burdens out-of-state acquirors and shareholders with the cost of protecting Indiana companies from takeovers.

The facial neutrality of the Control Share Chapter is thus irrelevant. This case is no different from numerous decisions of this Court under the Commerce Clause striking down facially neutral regulations as disproportionally affecting out-of-state parties and impeding the flow of interstate commerce. *See, e.g., Southern Pacific Co. v. Arizona,* 325 U.S. 761 (1945) (facially neutral regulation of train lengths).

States may not prevent out-of-state parties from gaining access to and placing in interstate commerce the resources of that state. *See, e.g., Hughes v. Oklahoma,* 441 U.S. 322 (1979) (prohibition on shipment of minnows outside state); *Pennsylvania v. West Virginia,* 262 U.S. 553 (1923) (requirement that local natural gas producers supply all in-state needs before servicing out-of-state customers). The Control Share Chapter attempts to prevent the shift of corporate control, assets and operations from Indiana to other states. For purposes of Commerce Clause analysis, it is no different from the statute in *Hughes* that prohibited the shipment of Oklahoma's minnows to other states.

The Chapter also gives the incumbent management of Indiana businesses a privileged position in the interstate market for corporate control, thereby having a discriminatory effect on interstate commerce. *Cf. Brown-Forman Distillers Corp. v. New York State Liquor Authority,* 476 U.S. ____, 106 S. Ct. 2080, 2085, 90 L.Ed 2d 552, 560 (1986) ("Economic protectionism . . . may include attempts to give local consumers an advantage over consumers in other States.") Management is free to

acquire out-of-state corporations and shift their assets and operations to Indiana. Nothing in Indiana law prevents the management of Indiana corporations from voluntarily transferring corporate control, assets and operations to other states. Yet, the Chapter allows management to strip acquirors—a large majority of whom will be from out-of-state—of the competitive advantages they may have earned for themselves in the market for corporate control by blocking them from using a tender offer which fully complies with federal law to acquire control over Indiana corporations. *See Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333, 351 (1977). This lack of reciprocity in the Chapter portends a wave of protectionist legislation that is inconsistent with the Commerce Clause as each state attempts to restrict out-of-state acquirors from obtaining control of resident corporations while giving resident corporations free rein to obtain control of out-of-state corporations. *See generally H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 538-39 (1949).

Finally, the Control Share Chapter is unconstitutional because it forces economic operations to be performed within Indiana, even though these same operations might be performed more efficiently elsewhere if Indiana had not chilled the market for corporate control by harshly restricting tender offers. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (striking down statute requiring cantaloupes to be packed in state; announcing rule of per se invalidity); *Toomer v. Witsell*, 334 U.S. 385 (1948) (striking down statute requiring in-state processing of shrimp); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928)(same).

### C. The Chapter is a Direct Regulation of Interstate Commerce

The Control Share Chapter is also per se violative of the Commerce Clause because it directly regulates the transactions of out-of-state residents in interstate commerce. Last term, this

Court in *Brown-Forman Distillers, supra,* struck down as a direct regulation of interstate commerce a statute that forced liquor distillers to conform the prices they charged in other states to their in-state prices and expressly relied upon *MITE*'s discussion of the per se invalidity of direct regulations of interstate commerce, 457 U.S. at 641-643.

Like the Illinois Business Takeover Act struck down in *MITE,* the Control Share Chapter directly regulates extensive out-of-state transactions between tender offerors and shareholders by forcing the tender offeror to meet a battery of state-imposed requirements before going ahead with its tender offer. Direct regulation of nonresidents is inevitable because the Chapter applies even if the tender offeror, 90% of the target company's shareholders, and the management of the target corporation are located outside Indiana.

CTS and Indiana would have this Court believe that in adopting the Control Share Chapter, Indiana has washed its hands of any regulatory activities having extraterritorial effects. In reality Indiana has simply deputized those most likely to exploit the protectionist provisions of the Chapter: the incumbent management of Indiana corporations. Indiana's efforts are unavailing. A state may not regulate by indirection commerce within other states. *See Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. 511, 524 (1935).

**D. The Chapter's Burden on Interstate Commerce Far Outweighs its Local Benefits**

Even if the Control Share Chapter is not unlawful per se, it violates the Commerce Clause because the burdens it imposes on interstate commerce far exceed the putative local benefits. *See Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970). Summary affirmance is warranted because this case is *MITE* revisited.

**1. The Burdens on Interstate Commerce are Great**

What Indiana has done with the Control Share Chapter is to "slow or freeze the flow of commerce for protectionist reasons . . . [and] . . . isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." *Philadelphia v. New Jersey,* 437 U.S. 617, 628 (1978); *see also Dean Milk Co. v. City of Madison,* 340 U.S. 349, 354 (1951)(state may not erect economic barrier to protect local industry). Indiana has burdened the interstate market for corporate control by hindering the operation of a key component of that market—the tender offer mechanism.

The impact of the Control Share Chapter on interstate commerce is indistinguishable from the impact of the Illinois Business Takeover Act struck down in *MITE.* Like the Illinois statute, the Chapter imposes an additional layer of burdensome requirements on the extensive federal regulation of tender offers. These requirements embody a strong pro-management bias and would deter numerous tender offer transactions in interstate commerce between nonresident parties.

This Court has already recognized the harm to shareholders and society when a State burdens the market for corporate control by discouraging tender offers:

> The effects of allowing [a State] to block a nationwide tender offer are substantial. Shareholders are deprived of the opportunity to sell their shares at a premium. The reallocation of economic resources to their highest valued use, a process which can improve efficiency and competition, is hindered. The incentive the tender offer mechanism provides incumbent management to perform well so that stock prices remain high is reduced.

*MITE,* 457 U.S. at 643.

**2. The Purported Benefits of the Chapter Are Illusory**

Both Indiana and CTS disingenuously suggest that the Control Share Chapter is directed at protecting shareholders

and the public, ignoring that § 23-1-42-5 gives *management* the sole discretion to adopt and administer the Chapter. It is pure sophistry to suggest that in invoking and administering the Chapter the management of Indiana corporations will have special solicitude for Indiana shareholders and residents.

Management and shareholders have divergent interests in the takeover context. *See, e.g., Unocal Corp. v. Mesa Petroleum Co.,* 493 A.2d 946, 954-55 (Del. 1985) (noting the "omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders" in considering a tender offer). CTS management's single-minded opposition to DCA's tender offer and proxy solicitation and its rush to embrace the Control Share Chapter graphically illustrate this conflict. The Seventh Circuit observed that as a result of the defensive measures deployed by the CTS management, "[t]o buy CTS, you must buy out its management." Slip op. at 16.

Ironically, the claim that the Control Share Chapter protects shareholders by requiring shareholder voting illustrates this point. The Chapter allows *management* to adopt the Control Share Chapter *without shareholder approval,* thus giving management the nearly absolute discretion to sacrifice the well-recognized benefits of tender offers to shareholders in order to preserve its control over the corporation.

In *MITE,* this Court noted that such incongruities are "at variance with [the State's] asserted legislative purpose, and tends to undermine appellants' justification for the burdens the statute imposes on interstate commerce." *MITE,* 457 U.S. at 644. There, the statute exempted from its coverage defensive self tenders orchestrated by management. Here, management has absolute discretion in employing the Chapter. *See also Raymond Motor Transportation, Inc. v. Rice,* 434 U.S. 429, 446-47 (1978) (noting that exceptions favoring local interests undermine presumption in favor of statutory validity). Benefits

to shareholders and third parties—if present at all—are only provided incidentally by the Chapter.

Even if the interests which appellants suggest that the Control Share Chapter is designed to serve are taken at face value, they are not significantly or evenhandedly advanced by the Chapter. This Court observed in *Lewis v. BT Investment Managers, Inc.* that:

> In almost any Commerce Clause case it would be possible for a State to argue that it has an interest in bolstering local ownership, or wealth, or control of business enterprise. Yet these arguments are at odds with the general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition.

447 U.S. at 43-44.[11]

**a. Protection of Shareholders**

Appellants argue that the chapter protects small shareholders who choose not to tender their shares and are faced with the prospect of co-existing with a large shareholder. This argument ignores reality. The available evidence indicates that small shareholders benefit from the presence of a large shareholder, as, for example, by the aggressive monitoring of management by the large shareholder, whose sizeable investment is a powerful incentive to zealous oversight. *See* Easterbrook & Fischel, *Voting in Corporate Law,* 26 J. Law. & Econ. 395 (1983). Small shareholders also share in the premiums that result from the facilitation of corporate control

[11] *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117 (1978), upon which appellants rely, is clearly distinguishable because there the statute did not restrict the flow of interstate commerce or insulate local companies from the operation of an interstate market. In contrast, the Control Share Chapter chills interstate commerce by deterring tender offers to protect local companies from the interstate market for corporate control.

transaction by the large shareholder, *see* Schleifer & Vishny, *Large Shareholders and Corporate Control,* 94 J. Pol. Econ. 461 (1986), and the value of their stock actually rises on the average after a control transaction that results in the creation of a large shareholder, *see* Bradley & Rosenzweig, *Defensive Stock Repurchases,* 99 Harv. L. Rev. 1378, 1410 (1986). The Chapter thus rests upon an unsupported fear of large shareholders. By deterring tender offers altogether, the Chapter in any event is an unreasonably heavy-handed way of protecting minority shareholders from the speculative fear of oppressive conduct by an occasional large shareholder.

In addition, the shareholder protection provisions of the Control Share Chapter duplicate those of the Williams Act. The Williams Act ensures that shareholders have all relevant information before "voting" for the tender offer (and offeror) by tendering their shares. If the tender offeror fails to provide a premium sufficient to compensate shareholders for the risks that accompany a change of control, not enough shareholders will tender their shares and the tender offer will be "voted" down.[12] The Chapter distorts shareholder choice by giving management—who would otherwise have no direct role in the tender offer—the opportunity to wield its considerable influence with shareholders in a last ditch effort to scuttle the tender offer.

Finally, Indiana has other statutes which are much more closely tailored to protect minority shareholders and which are uniformly applicable to Indiana corporations. The Business Combinations Chapter, Ind. Code § 23-1-43, for example, specifically protects minority shareholders against squeeze-out mergers. Minority shareholders are vested with dissenter's rights. Ind. Code § 23-1-44. They are further protected by the fiduciary obligations to minority shareholders that Indiana law

[12] Federal proxy regulations further protect shareholders in cases like this where the tender offeror combines a proxy solicitation campaign and a tender offer.

imposes on any party who acquires control of an Indiana corporation.

**b. Shareholder Ratification of a Fundamental Corporate Change**

Alternatively, CTS and Indiana argue that the Control Share Chapter is an innocuous regulation of the internal affairs of Indiana corporations that gives shareholders the right to ratify a change in the pattern of ownership of the corporation's common stock by approving or disapproving a tender offer before it is consummated. They incorrectly analogize the Control Share Chapter to provisions requiring shareholder approval of mergers, sale of corporate assets, corporate dissolutions and other fundamental changes in the *structure* of the corporation.

As this Court recognized in *MITE*, tender offers do not implicate the internal affairs of the corporation. 457 U.S. at 645-46. Tender offers are transactions in interstate commerce solely between the tender offeror and shareholders. The only issue is who will supervise the assets and operations of an otherwise unchanged corporation. In contrast, mergers, sales of assets, dissolution of the corporation and creation of new classes of stock affect the internal structure of the corporation and shareholder approval provides a crucial review of management's actions in arranging these transactions.

Moreover, the complicated voting provisions of the Control Share Chapter are democratic in appearance only. Section 23-1-42-9(b)(2) of the Chapter permits even a small minority comprised of so-called disinterested shareholders to thwart the will of the majority of all shareholders with respect to a control share transaction. In contrast, all other corporate decisions which must be ratified by shareholders under Indiana law must be approved by a simple majority of *all* shareholders, be they interested, disinterested or simply uninterested.

Dire warnings to the contrary, there is no danger that by affirming the Seventh Circuit this Court will be federalizing state corporate law. By their nature, tender offers involve

extensive interstate commerce more certainly than other corporate activities regulated by the state. Moreover, because tender offers are a relatively recent phenomena, state regulation of tender offers is neither as developed nor as engrained as other areas of state corporate law. In fact, the Williams Act was prompted largely because the paucity of state tender offer regulation left investors unprotected and because of the need for uniform regulation of tender offers in the national market for corporate control.

The Seventh Circuit properly focused on the practical impact of the Control Share Chapter on interstate commerce and its decision stands for the unremarkable proposition that state laws that unduly burden interstate commerce are unconstitutional. Because of the limited and fact-intensive nature of its analysis, the Seventh Circuit's decision does not restrict in any way Indiana's authority to regulate its corporations in ways that do not unduly burden interstate commerce.

#### c. Protection of Indiana Companies and Residents

The Chapter is an ineffective means of protecting either Indiana companies or citizens. If the Chapter attempts to slow the pace of takeovers by resorting to economic protectionism, it is unlawful. Even if the Chapter is not per se unconstitutional, there is no reason to believe that shareholders of Indiana corporations—most of whom can be from out-of-state—will oppose value-maximizing changes in corporate control in order to keep corporate assets and operations in Indiana. Nor is there any evidence that successful tender offerors are more likely than existing management to shift the assets and operations of Indiana corporations to other states. It is significant that the Chapter neither establishes criteria that take into account the interests of Indiana citizens nor places any limits on the out-of-state transfer of assets and operations by Indiana corporations.

## V. PLENARY CONSIDERATION IS UNNECESSARY

Plenary consideration of the Seventh Circuit's decision is unnecessary. The District Court did not invalidate the Chapter

altogether but only prohibited CTS from applying the Chapter against DCA's tender offer. There is also no need to re-examine *MITE.* That decision has been consistently applied by other lower courts and is dispositive here without extension or reinterpretation.

**A. The District Court's Decision Was Limited to the Particular Facts of This Case**

The unique facts giving rise to this case make it an inappropriate vehicle for a sweeping review by this Court of the constitutionality of the Control Share Chapter or control share acquisition statutes generally. The timing of CTS' adoption of the Chapter and its unwillingness to hold a special shareholders meeting before the Annual Meeting created a direct conflict between the Chapter and the Williams Act and a pressing threat of irreparable harm that may be absent in other cases. Neither the District Court nor the Seventh Circuit ruled out the possibility that the Chapter could constitutionally be applied by Indiana corporations that are significantly more local in nature than CTS. Indeed, the District Court's ruling was limited to a holding that the Chapter "may not constitutionally be applied *to prevent DCA* from voting any shares acquired through its tender offer at the April 25, 1986 metting." (CTS App. at 87) (emphasis added)

**B. *MITE* Is Dispositive and Has Provided Clear Guidance to the Lower Courts**

*MITE* is controlling, and provides two solid grounds for summary affirmance: (1) the direct conflict between the timing requirements of the Control Share Chapter and the Williams Act; and (2) the burden imposed by the Chapter on interstate commerce far outweighs benefits identified *post hoc* by opposing counsel. If anything, the Chapter is more objectionable than the anti-takeover statute struck down in *MITE* because it is administered by management, which is naturally more resistant to tender offers than presumptively neutral state officials.

There is no merit to CTS' claim that plenary consideration is necessary because the lower courts are divided or confused in their application of *MITE.* (CTS Br. at 9-10) The lower courts have consistently followed *MITE* in their treatment of state regulations of corporate takeovers.

Since *MITE,* lower courts have uniformly struck down statutes that were akin to the Illinois Business Takeover Act. *See, e.g., Mesa Petroleum Co. v. Cities Service Co.,* 715 F.2d 1425 (10th Cir. 1983); *Telvest v. Bradshaw,* 697 F.2d 576 (4th Cir. 1983); *Martin-Marietta Corp. v. Bendix Corp.,* 690 F.2d 558 (6th Cir. 1982); *National City Lines, Inc. v. LLC Corp.,* 687 F.2d 1122 (8th Cir. 1982). They have also uniformly struck down control share acquisition acts, correctly recognizing that such statutes are thinly veiled evasions of *MITE. See, e.g., Fleet Aerospace Corp. v. Holderman,* Fed. Sec. L. Rep. (CCH) ¶ 92,800 (6th Cir. June 25, 1986); *Terry v. Yamashita,* Fed. Sec. L. Rep. (CCH) ¶ 92,845 (D. Haw. June 13, 1986); *APL Limited Partnership v. Van Dusen Air, Inc.,* 622 F.Supp. 1216 (D. Minn. 1985), *vacated on other ground, and appeal dismissed* Nos. 85-5285/5286 MN (8th Cir. November 26, 1985); *Icahn v. Blunt,* 612 F.Supp. 1400 (W.D. Mo. 1985).

The lower courts have been guided by two principles. First, state regulations that require an extension of tender offers beyond the twenty business day period mandated by the Williams Act create an impermissible delay that runs afoul of the Supremacy Clause. Second, state regulations that interfere with significant numbers of interstate transactions between tender offerors and nonresident shareholders directly regulate interstate commerce, smack of economic protectionism, are not offset by legitimate local benefits and are barred by the Commerce Clause. These principles provide clear standards for both courts and state legislators.

The lower courts *have* upheld state legislation that is not designed to thwart tender offers and chill the market for corporate control but to advance legitimate state interests, as

suggested by Justices Powell and Stevens in their concurrences in *MITE*. *See, e.g., L.P. Acquisition Co. v. Tyson*, 772 F.2d 201 (6th Cir. 1985) (upholding state regulation of a tender offer that was not subject to the requirements of the Williams Act); *Cardiff Acquisitions, Inc. v. Hatch*, 751 F.2d 906 (8th Cir. 1984) (upholding portions of the Minnesota Takeover Act because they did not unduly burden tender offerors, cause delay, or allow enforcement beyond state borders).

Given the balanced approach to state tender offer regulation taken by the lower courts, the fact-intensive nature of each case that implicates state regulations and the highly unusual circumstances of the case giving rise to this appeal, plenary review is neither necessary nor desirable.

**C. DCA Is Severely Prejudiced By Further Delay**

Plenary consideration could deprive DCA of its rights as CTS' largest shareholder over the next crucial months. DCA's goal from the outset has been to elect its slate of directors and oust the inefficient present management of CTS.[13] But as a practical matter, DCA cannot call a special shareholders meeting to elect a new slate of CTS directors if during the pendency of this appeal it is restrained or deterred from voting any of the shares it acquired in its tender offer and in any subsequent control share acquisition. If this Court orders plenary consideration, the pendency of the appeal could prevent DCA from voting its shares at the next CTS Annual Meeting in April, 1987, when all of CTS' directors are up for election, or at an earlier shareholders meeting that DCA has the right under Indiana law to call at any time, Ind. Code § 23-1-29-2(a)(2).

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[13] The Seventh Circuit noted that "CTS has been a troubled firm of late," slip op. at 6, pointing to its declining rate of return, attributable in part to a "series of acquisitions to which [DCA] objected and which indeed turned out to be flops," *id.* at 12. It is noteworthy that the price of CTS stock has plummeted from 44¾ to 29⅛ (8/21/86) in recent weeks.

## CONCLUSION

The unanimous decision of the Seventh Circuit should be summarily affirmed.

Dated: August 25, 1986

Respectfully submitted,

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(4) (4)

Nos. 86-71 & 86-97



IN THE

# Supreme Court of the United States

OCTOBER TERM 1986

CTS CORPORATION,

*Appellant,*

*v.*

DYNAMICS CORPORATION OF AMERICA,

*Appellee.*

STATE OF INDIANA,

*Intervenor-Appellant,*

*v.*

DYNAMICS CORPORATION OF AMERICA,

*Appellee.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## APPENDIX TO MOTION OF APPELLEE DYNAMICS CORPORATION OF AMERICA TO AFFIRM

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SECTION 1. IC 23-1-17 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS:

Chapter 17. Construction and Application.

Sec. 1. This article shall be known and may be cited as the Indiana Business Corporation Law.

Sec. 2. The general assembly has power to amend or repeal all or part of this article at any time, and all domestic and foreign corporations subject to this article are governed by the amendment or repeal.

Sec. 3. (a) After July 31, 1987, this article applies to all domestic corporations in existence on July 31, 1987, that were incorporated under IC 23-1-1 through IC 23-1-12 or any other prior law. It also applies to all corporations incorporated under IC 23-1-21.

(b) Before August 1, 1987, the provisions of IC 23-1-18 through IC 23-1-54 do not apply to any domestic corporation, except in accordance with the following:

(1) The corporation's board of directors must adopt a resolution electing to have IC 23-1-18 through IC 23-1-54 (except for IC 23-1-18-3, IC 23-1-21, and IC 23-1-53-3) apply to the corporation.

(2) The resolution must specify a date (after March 31, 1986, and before August 1, 1987) on and after which those provisions will apply to the corporation.

(3) The resolution must be filed in the office of the secretary of state before the date specified under subdivision (2).

(c) The provisions of IC 23-1-18 through IC 23-1-54 (except for IC 23-1-18-3, IC 23-1-21, and IC 23-1-53-3) apply to each domestic corporation that complies with all the conditions prescribed by subsection (b). In addition, such a corporation shall continue to comply with the requirements of

IC 23-1-8 and IC 23-3-2 until August 1, 1987, but it is not subject to the provisions of IC 23-1-1 through IC 23-1-7, IC 23-1-9 through IC 23-1-12, and IC 23-3-1.

Sec. 4. After July 31, 1987, this article applies to all foreign corporations that want to transact business in Indiana. A foreign corporation authorized to transact business in Indiana on July 31, 1987, is subject to this article but is not required to obtain a new certificate of authority to transact business under this article.

Sec. 5. Official comments may be published by the general corporation law study commission (P.L.362-1985, as amended), and, after their publication, the comments may be consulted by the courts to determine the underlying reasons, purposes, and policies of this article and may be used as a guide in its construction and application.

SECTION 6. IC 23-1-22 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS:

Chapter 22. Powers and Purposes.

Sec. 1. (a) Every corporation incorporated under this article has the purpose of engaging in any lawful business unless a more limited purpose is set forth in the articles of incorporation.

(b) A corporation engaging in a business that is subject to regulation under another statute of this state may incorporate under this article unless provisions for incorporation of corporations engaging in that business exist under that statute.

Sec. 2. Unless its articles of incorporation provide otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, including without limitation power to:

(1) sue and be sued, complain and defend in its corporate name;

(2) have a corporate seal, which may be altered at will, and to use it, or a facsimile of it, by impressing or affixing it or in any other manner reproducing it (however, the use of a corporate seal or an impression thereof is not required and does not affect the validity of any instrument whatsoever, notwithstanding any other statutes);

(3) make and amend bylaws, not inconsistent with its articles of incorporation or with the laws of this state, for managing the business and regulating the affairs of the corporation;

(4) purchase, receive, lease, or otherwise acquire and own, hold, improve, use, and otherwise deal with real or personal property, or any legal or equitable interest in property, wherever located;

(5) sell, convey, mortgage, pledge, lease, exchange, and otherwise dispose of all or any part of its property;

(6) purchase, receive, subscribe for, or otherwise acquire; own, hold, vote, use, sell, mortgage, lend, pledge, or otherwise dispose of; and deal in and with shares or other interests in, or obligations of, any entity, including itself, except as otherwise prohibited by this article;

(7) make contracts and guarantees, incur liabilities, borrow money, issue its notes, bonds, and other obligations (which may be convertible into or include the option to purchase other securities of the corporation), and secure any of its obligations by mortgage or pledge of any of its property, franchises, or income;

(8) lend money, invest and reinvest its funds, and receive and hold real and personal property as security for repayment;

(9) be a promoter, partner, member, associate, or manager of any partnership, joint venture, trust, or other entity;

(10) conduct its business, locate offices and exercise the powers granted by this article within or without Indiana;

(11) elect directors, elect and appoint officers, and appoint employees and agents of the corporation, define their duties, fix their compensation, and lend them money and credit;

(12) pay pensions and establish and administer pension plans, pension trusts, profit sharing plans, share bonus plans, share option plans, welfare plans, qualified and nonqualified retirement plans, and benefit or incentive plans for any or all of its current or former directors, officers, employees, and agents;

(13) make donations for the public welfare or for charitable, scientific, or educational purposes;

(14) transact any lawful business that will aid governmental policy; and

(15) make payments or donations, or do any other act, not inconsistent with law, that furthers the business and affairs of the corporation.

Sec. 3. (a) In anticipation of or during an emergency defined in subsection (d), the board of directors of a corporation may:

(1) modify lines of succession to accommodate the incapacity of any director, officer, employee, or agent; and

(2) relocate the principal office, designate alternative principal offices or regional offices, or authorize the officers to do so.

(b) During an emergency defined in subsection (d), unless emergency bylaws provide otherwise:

(1) notice of a meeting of the board of directors need be given only to those directors whom it is practicable to reach and may be given in any practicable manner, including by publication and radio; and

(2) one (1) or more officers of the corporation present at a meeting of the board of directors may be deemed to be directors for the meeting, in order of rank and within the same rank in order of seniority, as necessary to achieve a quorum.

(c) Corporate action taken in good faith during an emergency under this section to further the ordinary business affairs of the corporation:

(1) binds the corporation; and

(2) may not be used to impose liability on a corporate director, officer, employee, or agent.

(d) An emergency exists for purposes of this section if an extraordinary event prevents a quorum of the corporation's directors from assembling in time to deal with the business for which the meeting has been or is to be called.

Sec. 4. (a) In addition to any other provision contained in its articles of incorporation or bylaws or authorized by any other provision of this article, a corporation may establish one (1) or more procedures by which it regulates transactions that would, when consummated, result in a change of control of such corporation.

(b) For purposes of this section and any procedure established under this section, "control" means:

(1) for any corporation having one hundred (100) or more shareholders, the beneficial ownership, or the direct or indirect power to direct the voting, of no less than ten percent (10%) of the voting shares of a corporation's outstanding voting shares; and

(2) for any corporation having fewer than one hundred (100) shareholders, the beneficial ownership, or the direct or indirect power to direct the voting, of no less than fifty percent (50%) of the voting shares of the corporation's outstanding voting shares.

(c) A procedure established under this section may be adopted:

(1) in a corporation's original articles of incorporation or bylaws;

(2) by amending the articles of incorporation; or

(3) notwithstanding that a vote of the shareholders would otherwise be required by any other provision of this article or the articles of incorporation for the adoption or implementation of all or any portion of the procedure, by amending the bylaws.

Sec. 5. (a) Except as provided in subsection (b), the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.

(b) A corporation's power to act may be challenged:

(1) in a proceeding by a shareholder against the corporation to enjoin the act;

(2) in a proceeding by the corporation, directly, derivatively, or through a receiver, trustee, or other legal representative, against an incumbent or former director, officer, employee, or agent of the corporation; or

(3) in a proceeding by the attorney general under IC 23-1-47-1.

(c) In a shareholder's proceeding under subsection (b)(1) to enjoin an unauthorized corporate act, the court may enjoin or set aside the act, if equitable and if all affected persons are parties to the proceeding, and may award damages for loss

(other than anticipated profits) suffered by the corporation or another party because of enjoining the unauthorized act.

SECTION 13. IC 23-1-29 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS:

Chapter 29. Meetings of Shareholders.

Sec. 1. (a) A corporation must hold a meeting of the shareholders annually at a time stated in or fixed in accordance with the bylaws.

(b) Annual shareholders' meetings may be held in or out of Indiana at the place stated in or fixed in accordance with the bylaws. If no place is stated in or fixed in accordance with the bylaws, annual meetings shall be held at the corporation's principal office.

(c) The failure to hold an annual meeting at the time stated in or fixed in accordance with a corporation's bylaws does not affect the validity of any corporate action.

(d) If the articles of incorporation or bylaws so provide, any or all shareholders may participate in an annual shareholders' meeting by, or through the use of, any means of communication by which all shareholders participating may simultaneously hear each other during the meeting. A shareholder participating in a meeting by this means is deemed to be present in person at the meeting.

Sec 2. (a) A corporation must hold a special meeting of shareholders:

(1) on call of its board of directors or the person or persons authorized to do so by the articles of incorporation or bylaws; or

(2) if the holders of at least twenty-five percent (25%) of all the votes entitled to be cast on any issue proposed to be

considered at the proposed special meeting sign, date, and deliver to the corporation's secretary one (1) or more written demands for the meeting describing the purpose or purposes for which it is to be held.

(b) If not otherwise fixed under section 7 of this chapter, the record date for determining shareholders entitled to demand a special meeting is the date the first shareholder signs the demand.

(c) Special shareholders' meetings may be held in or out of Indiana at the place stated in or fixed in accordance with the bylaws. If no place is stated or fixed in accordance with the bylaws, special meetings shall be held at the corporation's principal office.

(d) Only business within the purpose or purposes described in the meeting notice required by section 5(c) of this chapter may be conducted at a special shareholders' meeting.

(e) If the articles of incorporation or bylaws so provide, any or all shareholders may participate in a special meeting of shareholders by, or through the use of, any means of communication by which all shareholders participating may simultaneously hear each other during the meeting. A shareholder participating in a meeting by this means is deemed to be present in person at the meeting.

Sec. 3. The circuit or superior court of the county where a corporation's principal office (or, if none in Indiana, its registered office) is located may order a meeting to be held and may fix the time and place of the meeting, which shall be conducted in accordance with the corporation's articles of incorporation and bylaws:

(1) on application of any shareholder of the corporation entitled to participate in an annual meeting if an annual meeting was not held within the earlier of six (6) months after the end of the corporation's fiscal year or fifteen (15) months after its last annual meeting; or

(2) on application of a shareholder who signed a demand for a special meeting valid under section 2 of this chapter if:

(A) notice of the special meeting was not given within sixty (60) days after the date the demand was delivered to the corporation's secretary; or

(B) the special meeting was not held in accordance with the notice.

Sec. 4. (a) Action required or permitted by this article to be taken at a shareholders' meeting may be taken without a meeting if the action is taken by all the shareholders entitled to vote on the action. The action must be evidenced by one (1) or more written consents describing the action taken, signed by all the shareholders entitled to vote on the action, and delivered to the corporation for inclusion in the minutes or filing with the corporate records.

(b) If not otherwise determined under section 7 of this chapter, the record date for determining shareholders entitled to take action without a meeting is the date the first shareholder signs the consent under subsection (a).

(c) A consent signed under this section has the effect of a meeting vote and may be described as such in any document.

(d) If this article requires that notice of proposed action be given to nonvoting shareholders and the action is to be taken by unanimous consent of the voting shareholders, the corporation must give its nonvoting shareholders written notice of the proposed action at least ten (10) days before the action is taken. The notice must contain or be accompanied by the same material that, under this article, would have been required to be sent to nonvoting shareholders in a notice of meeting at which the proposed action would have been submitted to the shareholders for action.

Sec. 5. (a) A corporation shall notify shareholders of the date, time, and place of each annual and special shareholders' meeting no fewer than ten (10) nor more than sixty (60) days before the meeting date. Unless this article or the articles of incorporation require otherwise, the corporation is required to give notice only to shareholders entitled to vote at the meeting.

(b) Unless this article or the articles of incorporation require otherwise, notice of an annual meeting need not include a description of the purpose or purposes for which the meeting is called.

(c) Notice of a special meeting must include a description of the purpose or purposes for which the meeting is called.

(d) If not otherwise fixed under section 7 of this chapter, the record date for determining shareholders entitled to notice of and to vote at an annual or special shareholders' meeting is the close of business on the day before the first notice is delivered to shareholders.

(e) Unless the bylaws require otherwise, if an annual or special shareholders' meeting is adjourned to a different date, time, or place, notice need not be given of the new date, time, or place if the new date, time, or place is announced at the meeting before adjournment. If a new record date for the adjourned meeting is or must be fixed under section 7 of this chapter, however, notice of the adjourned meeting must be given under this section to persons who are shareholders as of the new record date.

Sec. 6. (a) A shareholder may waive any notice required by this article, the articles of incorporation, or bylaws before or after the date and time stated in the notice. The waiver by the shareholder entitled to the notice must be in writing and be delivered to the corporation for inclusion in the minutes or filing with the corporate records.

(b) A shareholder's attendance at a meeting:

(1) waives objection to lack of notice or defective notice of the meeting, unless the shareholder at the beginning of the meeting objects to holding the meeting or transacting business at the meeting; and

(2) waives objection to consideration of a particular matter at the meeting that is not within the purpose or purposes described in the meeting notice, unless the shareholder objects to considering the matter when it is presented.

Sec. 7. (a) The bylaws may fix or provide the manner of fixing the record date for one (1) or more voting groups in order to determine the shareholders entitled to notice of a shareholders' meeting, to demand a special meeting, to vote, or to take any other action. If the bylaws do not fix or provide for fixing a record date, the board of directors of the corporation may fix a future date as the record date.

(b) A record date fixed under this section may not be more than seventy (70) days before the meeting or action requiring a determination of shareholders.

(c) A determination of shareholders entitled to notice of or to vote at a shareholders' meeting is effective for any adjournment of the meeting unless the board of directors fixes a new record date, which it must do if the meeting is adjourned to a date more than one hundred twenty (120) days after the date fixed for the original meeting.

(d) If a court orders a meeting adjourned to a date more than one hundred twenty (120) days after the date fixed for the original meeting, it may provide that the original record date continues in effect or it may fix a new record date.

SECTION 22. IC 23-1-38 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS:

Chapter 38. Amendment of Articles of Incorporation.

Sec. 1. (a) A corporation may amend its articles of incorporation at any time to add or change a provision that is

required or permitted to be in the articles of incorporation or to delete a provision not required to be in the articles of incorporation. Whether a provision is required or permitted to be in the articles of incorporation is determined as of the effective date of the amendment.

(b) A shareholder of the corporation does not have a vested property right resulting from any provision in the articles of incorporation, or authorized to be in the bylaws by this article or the articles of incorporation including provisions relating to management, control, capital structure, dividend entitlement, or purpose or duration of the corporation.

Sec. 2. Unless the articles of incorporation provide otherwise, a corporation's board of directors may adopt one (1) or more amendments to the corporation's articles of incorporation without shareholder action to:

(1) extend the duration of the corporation if it was incorporated at a time when limited duration was required by law;

(2) delete the names and addresses of the initial directors;

(3) delete the name and address of the initial registered agent or registered office, if a statement of change is on file with the secretary of state;

(4) change each issued and unissued authorized share of an outstanding class into a greater number of whole shares or a lesser number of whole shares and fractional shares if the corporation has only shares of that class outstanding;

(5) change the corporate name by substituting the word "corporation", "incorporated", "company", "limited", or the abbreviation "corp.", "inc.", "co.", or "ltd.", for a similar word or abbreviation in the name, or by adding, deleting, or changing a geographical attribution for the name; or

(6) make any other change expressly permitted by this article to be made without shareholder action.

Sec. 3. (a) A corporation's board of directors may propose one (1) or more amendments to the articles of incorporation for submission to the shareholders.

(b) For the amendment to be adopted:

(1) the board of directors must recommend the amendment to the shareholders unless the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation and communicates the basis for its determination to the shareholders with the amendment; and

(2) the shareholders entitled to vote on the amendment must approve the amendment as provided in subsection (e).

(c) The board of directors may condition its submission of the proposed amendment on any basis.

(d) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with IC 23-1-29-5. The notice of meeting must also state that the purpose, or one (1) of the purposes, of the meeting is to consider the proposed amendment and must contain or be accompanied by a copy or summary of the amendment.

(e) Unless this article, the articles of incorporation, or the board of directors (acting under subsection (c)) require a greater vote or a vote by voting groups, the amendment to be adopted must be approved by:

(1) a majority of the votes entitled to be cast on the amendment by any voting group with respect to which the amendment would create dissenters' rights; and

(2) the votes required by IC 23-1-30-6 and IC 23-1-30-7 by every other voting group entitled to vote on the amendment.

Sec. 4. (a) The holders of the outstanding shares of a class are entitled to vote as a separate voting group (if shareholder voting is otherwise required by this article) on a proposed amendment if the amendment would:

(1) increase or decrease the aggregate number of authorized shares of the class;

(2) effect an exchange or reclassification of all or part of the shares of the class into shares of another class;

(3) effect an exchange or reclassification, or create the right of exchange, of all or part of the shares of another class into shares of the class;

(4) change the designation, rights, preferences, or limitations of all or part of the shares of the class;

(5) change the shares of all or part of the class into a different number of shares of the same class;

(6) create a new class of shares having rights or preferences with respect to distributions or to dissolution that are prior, superior, or substantially equal to the shares of the class;

(7) increase the rights, preferences, or number of authorized shares of any class that, after giving effect to the amendment, have rights or preferences with respect to distributions or to dissolution that are prior, superior, or substantially equal to the shares of the class;

(8) limit or deny an existing preemptive right of all or part of the shares of the class; or

(9) cancel or otherwise affect rights to distributions or dividends that have accumulated but not yet been declared on all or part of the shares of the class.

(b) If a proposed amendment would affect a series of a class of shares in one (1) or more of the ways described in subsection (a), the shares of that series are entitled to vote as a separate voting group on the proposed amendment.

(c) If a proposed amendment that entitles two (2) or more series of shares to vote as separate voting groups under this section would affect those two (2) or more series in the same or a substantially similar way, the shares of all the series so affected must vote together as a single voting group on the proposed amendment.

(d) A class or series of shares is entitled to the voting rights granted by this section although the articles of incorporation provide that the shares are nonvoting shares.

Sec. 5. If a corporation has not yet issued shares, its board of directors (or if a board of directors has not been selected, then the incorporators) may adopt one (1) or more amendments to the corporation's articles of incorporation.

Sec. 6. (a) A corporation amending its articles of incorporation shall deliver to the secretary of state for filing articles of amendment setting forth:

(1) the name of the corporation;

(2) the text of each amendment adopted;

(3) if an amendment provides for an exchange, reclassification, or cancellation of issued shares, provisions for implementing the amendment if not contained in the amendment itself;

(4) the date of each amendment's adoption;

(5) if an amendment was adopted by the incorporators or board of directors without shareholder action, a statement to that effect and that shareholder action was not required;

(6) if an amendment was approved by the shareholders:

(A) the designation, number of outstanding shares, number of votes entitled to be cast by each voting group entitled to vote separately on the amendment, and number of votes of each voting group represented at the meeting;

(B) either the total number of votes cast for and against the amendment by each voting group entitled to vote separately on the amendment or the total number of votes cast for the amendment by each voting group and a statement that the number cast for the amendment by each voting group was sufficient for approval by that voting group.

(b) If a corporation amends its articles of incorporation to change its corporate name, it may, after the amendment has become effective, file for record with the county recorder of each county in Indiana in which it has real property at the time the amendment becomes effective a file-stamped copy of the articles of amendment. The validity of a change in name is not affected by a corporation's failure to record the articles of amendment.

Sec. 7. (a) A corporation's board of directors or, if the board of directors has not been selected, the incorporators may restate its articles of incorporation at any time with or without shareholder action.

(b) The restatement may include one (1) or more amendments to the articles. If the restatement includes an amendment requiring shareholder approval, it must be adopted as provided in section 3 of this chapter.

(c) If the board of directors submits a restatement for shareholder action, the corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with IC 23-1-29-5. The notice must also state that the purpose, or one (1) of the purposes, of the meeting is to consider the proposed restatement and must contain or be accompanied by a copy of the restatement that identifies any amendment or other change it would make in the articles.

(d) A corporation restating its articles of incorporation shall deliver to the secretary of state for filing articles of

restatement setting forth the name of the corporation and the text of the restated articles of incorporation together with a certificate setting forth:

(1) whether the restatement contains an amendment to the articles requiring shareholder approval and, if it does not, that the board of directors adopted the restatement; or

(2) if the restatement contains an amendment to the articles requiring shareholder approval, the information required by section 6 of this chapter.

(e) Duly adopted restated articles of incorporation supersede the original articles of incorporation and all amendments to them.

(f) The secretary of state may certify restated articles of incorporation, as the articles of incorporation currently in effect, without including the certificate information required by subsection (d).

Sec. 8. (a) A corporation's articles of incorporation may be amended without action by the board of directors or shareholders to carry out a plan of reorganization ordered or decreed by a court of competent jurisdiction under federal statute if the articles of incorporation after amendment contain only provisions required or permitted by IC 23-1-21-2.

(b) The individual or individuals designated by the court shall deliver to the secretary of state for filing articles of amendment setting forth:

(1) the name of the corporation;

(2) the text of each amendment approved by the court;

(3) the date of the court's order or decree approving the articles of amendment;

(4) the title of the reorganization proceeding in which the order or decree was entered; and

(5) a statement that the court had jurisdiction of the proceeding under federal statute.

(c) Shareholders of a corporation undergoing reorganization [illegible] not have dissenters' rights except as provided in the reorganization plan.

(d) This section does not apply after entry of a final decree in the reorganization proceeding even though the court retains jurisdiction of the proceeding for limited purposes unrelated to consummation of the reorganization plan.

Sec. 9. An amendment to articles of incorporation does not affect a cause of action existing against or in favor of the corporation, a proceeding to which the corporation is a party, or the preexisting rights of persons other than shareholders of the corporation. An amendment changing a corporation's name does not abate a proceeding brought by or against the corporation in its former name.

SECTION 26. IC 23-1-42 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS:

Chapter 42. Control Share Acquisitions.

Sec. 1. As used in this chapter, "control shares" means shares that, except for this chapter, would have voting power with respect to shares of an issuing public corporation that, when added to all other shares of the issuing public corporation owned by a person or in respect to which that person may exercise or direct the exercise of voting power, would entitle that person, immediately after acquisition of the shares (directly or indirectly, alone or as a part of a group), to exercise or direct the exercise of the voting power of the issuing public corporation in the election of directors within any of the following ranges of voting power:

(1) One-fifth (1/5) or more but less than one-third (1/3) of all voting power.

(2) One-third (1/3) or more but less than a majority of all voting power.

(3) A majority or more of all voting power.

Sec. 2. (a) As used in this chapter, "control share acquisition" means the acquisition (directly or indirectly) by any person of ownership of, or the power to direct the exercise of voting power with respect to, issued and outstanding control shares.

(b) For purposes of this section, shares acquired within ninety (90) days or shares acquired pursuant to a plan to make a control share acquisition are considered to have been acquired in the same acquisition.

(c) For purposes of this section, a person who acquires shares in the ordinary course of business for the benefit of others in good faith and not for the purpose of circumventing this chapter has voting power only of shares in respect of which that person would be able to exercise or direct the exercise of votes without further instruction from others.

(d) The acquisition of any shares of an issuing public corporation does not constitute a control share acquisition if the acquisition is consummated in any of the following circumstances:

(1) Before January 8, 1986.

(2) Pursuant to a contract existing before January 8, 1986.

(3) Pursuant to the laws of descent and distribution.

(4) Pursuant to the satisfaction of a pledge or other security interest created in good faith and not for the purpose of circumventing this chapter.

(5) Pursuant to a merger or plan of share exchange effected in compliance with IC 23-1-40 if the issuing public corporation is a party to the agreement of merger or plan of share exchange.

(e) The acquisition of shares of an issuing public corporation in good faith and not for the purpose of circumventing this chapter by or from:

(1) any person whose voting rights had previously been authorized by shareholders in compliance with this chapter; or

(2) any person whose previous acquisition of shares of an issuing public corporation would have constituted a control share acquisition but for subsection (d);

does not constitute a control share acquisition, unless the acquisition entitles any person (directly or indirectly, alone or as a part of a group) to exercise or direct the exercise of voting power of the corporation in the election of directors in excess of the range of the voting power otherwise authorized.

Sec. 3. As used in this chapter, "interested shares" means the shares of an issuing public corporation in respect of which any of the following persons may exercise or direct the exercise of the voting power of the corporation in the election of directors:

(1) An acquiring person or member of a group with respect to a control share acquisition.

(2) Any officer of the issuing public corporation.

(3) Any employee of the issuing public corporation who is also a director of the corporation.

Sec. 4. (a) As used in this chapter, "issuing public corporation" means a corporation that has:

(1) one hundred (100) or more shareholders;

(2) its principal place of business, its principal office, or substantial assets within Indiana; and

(3) either:

(A) more than ten percent (10%) of its shareholders resident in Indiana;

(B) more than ten percent (10%) of its shares owned by Indiana residents; or

(C) ten thousand (10,000) shareholders resident in Indiana.

(b) The residence of a shareholder is presumed to be the address appearing in the records of the corporation.

(c) Shares held by banks (except as trustee or guardian), brokers or nominees shall be disregarded for purposes of calculating the percentages or numbers described in this section.

Sec. 5. Unless the corporation's articles of incorporation or bylaws provide that this chapter does not apply to control share acquisitions of shares of the corporation before the control share acquisition, control shares of an issuing public corporation acquired in a control share acquisition have only such voting rights as are conferred by section 9 of this chapter.

Sec. 6. Any person who proposes to make or has made a control share acquisition may at the person's election deliver an acquiring person statement to the issuing public corporation at the issuing public corporation's principal office. The acquiring person statement must set forth all of the following:

(1) The identity of the acquiring person and each other member of any group of which the person is a part for purposes of determining control shares.

(2) A statement that the acquiring person statement is given pursuant to this chapter.

(3) The number of shares of the issuing public corporation owned (directly or indirectly) by the acquiring person and each other member of the group.

(4) The range of voting power under which the control share acquisition falls or would, if consummated, fall.

(5) If the control share acquisition has not taken place:

(A) a description in reasonable detail of the terms of the proposed control share acquisition; and

(B) representations of the acquiring person, together with a statement in reasonable detail of the facts upon which they are based, that the proposed control share acquisition, if consummated, will not be contrary to law, and that the acquiring person has the financial capacity to make the proposed control share acquisition.

Sec. 7. (a) If the acquiring person so requests at the time of delivery of an acquiring person statement and gives an undertaking to pay the corporation's expenses of a special meeting, within ten (10) days thereafter, the directors of the issuing public corporation shall call a special meeting of shareholders of the issuing public corporation for the purpose of considering the voting rights to be accorded the shares acquired or to be acquired in the control share acquisition.

(b) Unless the acquiring person agrees in writing to another date, the special meeting of shareholders shall be held within fifty (50) days after receipt by the issuing public corporation of the request.

(c) If no request is made, the voting rights to be accorded the shares acquired in the control share acquisition shall be presented to the next special or annual meeting of shareholders.

(d) If the acquiring person so requests in writing at the time of delivery of the acquiring person statement, the special meeting must not be held sooner than thirty (30) days after receipt by the issuing public corporation of the acquiring person statement.

Sec. 8. (a) If a special meeting is requested, notice of the special meeting of shareholders shall be given as promptly as reasonably practicable by the issuing public corporation to all shareholders of record as of the record date set for the meeting, whether or not entitled to vote at the meeting.

(b) Notice of the special or annual shareholder meeting at which the voting rights are to be considered must include or be accompanied by both of the following:

(1) A copy of the acquiring person statement delivered to the issuing public corporation pursuant to this chapter.

(2) A statement by the board of directors of the corporation, authorized by its directors, of its position or recommendation, or that it is taking no position or making no recommendation, with respect to the proposed control share acquisition.

Sec. 9. (a) Control shares acquired in a control share acquisition have the same voting rights as were accorded the shares before the control share acquisition only to the extent granted by resolution approved by the shareholders of the issuing public corporation.

(b) To be approved under this section, the resolution must be approved by:

(1) each voting group entitled to vote separately on the proposal by a majority of all the votes entitled to be cast by that voting group, with the holders of the outstanding shares of a class being entitled to vote as a separate voting group if the proposed control share acquisition would, if fully carried out, result in any of the changes described in IC 23-1-38-4(a); and

(2) each voting group entitled to vote separately on the proposal by a majority of all the votes entitled to be cast by that group, excluding all interested shares.

Sec. 10. (a) If authorized in a corporation's articles of incorporation or bylaws before a control share acquisition has occurred, control shares acquired in a control share acquisition with respect to which no acquiring person statement has been filed with the issuing public corporation may, at any time during the period ending sixty (60) days after the last acquisition of control shares by the acquiring person, be subject to redemption by the corporation at the fair value thereof pursuant to the procedures adopted by the corporation.

(b) Control shares acquired in a control share acquisition are not subject to redemption after an acquiring person statement has been filed unless the shares are not accorded full voting rights by the shareholders as provided in section 9 of this chapter.

Sec. 11. (a) Unless otherwise provided in a corporation's articles of incorporation or bylaws before a control share acquisition has occurred, in the event control shares acquired in a control share acquisition are accorded full voting rights and the acquiring person has acquired control shares with a majority or more of all voting power, all shareholders of the issuing public corporation have dissenters' rights as provided in this chapter.

(b) As soon as practicable after such events have occurred, the board of directors shall cause a notice to be sent to all shareholders of the corporation advising them of the facts and that they have dissenters' rights to receive the fair value of their shares pursuant to IC 23-1-44.

(c) As used in this section, "fair value" means a value not less than the highest price paid per share by the acquiring person in the control share acquisition.

SECTION 27. IC 23-1-43 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS:

Chapter 43. Business Combinations.

Sec. 1. As used in this chapter, "affiliate" means a person that directly, or indirectly through one (1) or more intermediaries, controls, is controlled by, or is under common control with, a specified person.

Sec. 2. As used in this chapter, "announcement date", when used in reference to any business combination, means the date of the first public announcement of the final, definitive proposal for the business combination.

Sec. 3. As used in this chapter, "associate", when used to indicate a relationship with any person, means:

(1) any corporation or organization of which the person is an officer or partner or is, directly or indirectly, the beneficial owner of ten percent (10%) or more of any class of voting shares;

(2) any trust or other estate in which the person has a substantial beneficial interest or as to which the person serves as trustee or in a similar fiduciary capacity; and

(3) any relative or spouse of the person, or any relative of the spouse, who has the same home as the person.

Sec. 4. As used in this chapter, "beneficial owner", when used with respect to any shares, means a person that:

(1) individually or with or through any of its affiliates or associates, beneficially owns the shares (directly or indirectly);

(2) individually or with or through any of its affiliates or associates, has:

(A) the right to acquire the shares (whether the right is exercisable immediately or only after the passage of time) under any agreement, arrangement, or understanding (whether or not in writing), or upon the exercise of conversion rights, exchange rights, warrants or options, or otherwise (however, a person is not considered the beneficial owner of shares tendered under a tender or exchange offer made by the person or any of the person's affiliates or associates until the tendered shares are accepted for purchase or exchange); or

(B) the right to vote the shares under any agreement, arrangement, or understanding (whether or not in writing) (however, a person is not considered the beneficial owner of any shares under this clause if the

agreement, arrangement, or understanding to vote the shares arises solely from a revocable proxy or consent given in response to a proxy or consent solicitation made in accordance with the applicable regulations under the Exchange Act and is not then reportable on a Schedule 13D under the Exchange Act, or any comparable or successor report); or

(3) has any agreement, arrangement, or understanding (whether or not in writing) for the purpose of acquiring, holding, voting (except voting under a revocable proxy or consent as described in subdivision (2)(B)), or disposing of the shares with any other person that beneficially owns, or whose affiliates or associates beneficially own, directly or indirectly, the shares.

Sec. 5. As used in this chapter, "business combination", when used in reference to any resident domestic corporation and any interested shareholder of the resident domestic corporation, means any of the following:

(1) Any merger of the resident domestic corporation or any subsidiary of the resident domestic corporation with:

(A) the interested shareholder; or

(B) any other corporation (whether or not itself an interested shareholder of the resident domestic corporation) that is, or after the merger or consolidation would be, an affiliate or associate of the interested shareholder.

(2) Any sale, lease, exchange, mortgage, pledge, transfer, or other disposition (in one (1) transaction or a series or transactions) to or with the interested shareholder or any affiliate or associate of the interested shareholder of assets of the resident domestic corporation or any subsidiary of the resident domestic corporation:

(A) having an aggregate market value equal to ten percent (10%) or more of the aggregate market value of all the assets, determined on a consolidated basis, of the resident domestic corporation;

(B) having an aggregate market value equal to ten percent (10%) or more of the aggregate market value of all the outstanding shares of the resident domestic corporation; or

(C) representing ten percent (10%) or more of the earning power or net income, determined on a consolidated basis, of the resident domestic corporation.

(3) The issuance or transfer by the resident domestic corporation or any subsidiary of the resident domestic corporation (in one (1) transaction or a series of transactions) of any shares of the resident domestic corporation or any subsidiary of the resident domestic corporation that have an aggregate market value equal to five percent (5%) or more of the aggregate market value of all the outstanding shares of the resident domestic corporation to the interested shareholder or any affiliate or associate of the interested shareholder except under the exercise of warrants or rights to purchase shares offered, or a dividend or distribution paid or made, pro rata to all shareholders of the resident domestic corporation.

(4) The adoption of any plan or proposal for the liquidation or dissolution of the resident domestic corporation proposed by, or under any agreement, arrangement, or understanding (whether or not in writing) with, the interested shareholder or any affiliate or associate of the interested shareholder.

(5) Any:

(A) reclassification of securities (including without limitation any share split, share dividend, or other

distribution of shares in respect of shares, or any reverse share split);

(B) recapitalization of the resident domestic corporation;

(C) merger or consolidation of the resident domestic corporation with any subsidiary of the resident domestic corporation; or

(D) other transaction (whether or not with or into or otherwise involving the interested shareholder); proposed by, or under any agreement, arrangement, or understanding (whether or not in writing) with, the interested shareholder or any affiliate or associate of the interested shareholder, that has the effect (directly or indirectly) of increasing the proportionate share of the outstanding shares of any class or series of voting shares or securities convertible into voting shares of the resident domestic corporation or any subsidiary of the resident domestic corporation that is directly or indirectly owned by the interested shareholder or any affiliate or associate of the interested shareholder, except as a result of immaterial changes due to fractional share adjustments.

(6) Any receipt by the interested shareholder or any affiliate or associate of the interested shareholder of the benefit (directly or indirectly, except proportionately as a shareholder of the resident domestic corporation), of any loans, advances, guarantees, pledges, or other financial assistance or any tax credits or other tax advantages provided by or through the resident domestic corporation.

Sec. 6. As used in this chapter, "common stock" means any shares other than preferred shares.

Sec. 7. As used in this chapter, "consummation date", with respect to any business combination, means the date of consummation of the business combination or, in the case of a

business combination as to which a shareholder vote is taken, the later of:

(1) the business day before the vote; or

(2) twenty (20) days before the date of consummation of the business combination.

Sec. 8. (a) As used in this chapter, "control", including the terms "controlling", "controlled by", and "under common control with", means the possession (directly or indirectly) of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

(b) A person's beneficial ownership of ten percent (10%) or more of the voting power of a corporation's outstanding voting shares creates a presumption that the person has control of the corporation.

(c) Notwithstanding subsections (a) and (b), a person is not considered to have control of a corporation if the person holds voting power, in good faith and not for the purpose of circumventing this chapter, as an agent, bank, broker, nominee, custodian, or trustee for one (1) or more beneficial owners who do not individually or as a group have control of the corporation.

Sec. 9. As used in this chapter, "Exchange Act" means the Act of Congress known as the Securities Exchange Act of 1934, as amended.

Sec. 10. (a) As used in this chapter, "interested shareholder", when used in reference to any resident domestic corporation, means any person (other than the resident domestic corporation or any subsidiary of the resident domestic corporation) that is:

(1) the beneficial owner, directly or indirectly, of ten percent (10%) or more of the voting power of the outstanding voting shares of the resident domestic corporation; or

(2) an affiliate or associate of the resident domestic corporation and at any time within the five (5) year period immediately before the date in question was the beneficial owner, directly or indirectly, of ten percent (10%) or more of the voting power of the then outstanding shares of the resident domestic corporation.

(b) For the purpose of determining whether a person is an interested shareholder, the number of voting shares of the resident domestic corporation considered to be outstanding includes shares considered to be beneficially owned by the person through application of section 4 of this chapter, but does not include any other unissued shares of voting shares of the resident domestic corporation that may be issuable under any agreement, arrangement, or understanding, or upon exercise of conversion rights, warrants or options, or otherwise.

Sec. 11. As used in this chapter, "market value", when used in reference to shares or property of any resident domestic corporation, means the following:

(1) In the case of shares, the highest closing sale price of a share during the thirty (30) day period immediately preceding the date in question on the composite tape for New York Stock Exchange listed shares, or, if the shares are not quoted on the composite tape or not listed on the New York Stock Exchange, on the principal United States securities exchange registered under the Exchange Act on which the shares are listed, or, if the shares are not listed on any such exchange, the highest closing bid quotation with respect to a share during the thirty (30) day period preceding the date in question on the National Association of Securities Dealers, Inc. Automated Quotations System or any system then in use, or if no such quotation is available, the fair market value on the date in question of a share as determined by the board of directors of the resident domestic corporation in good faith.

(2) In the case of property other than cash or shares, the fair market value of the property on the date in question as determined by the board of directors of the resident domestic corporation in good faith.

Sec. 12. As used in this chapter, "preferred stock" means any class or series of shares of a resident domestic corporation that under the bylaws or articles of incorporation of the resident domestic corporation:

(1) is entitled to receive payment of dividends before any payment of dividends on some other class or series of shares; or

(2) is entitled in the event of any voluntary liquidation, dissolution, or winding up of the corporation to receive payment or distribution of a preferential amount before any payments or distributions are received by some other class or series of shares.

Sec. 13. (a) As used in this chapter, "resident domestic corporation" means a corporation that has one hundred (100) or more shareholders.

(b) A resident domestic corporation does not cease to be a resident domestic corporation by reason of events occurring or actions taken while the resident domestic corporation is subject to this chapter.

Sec. 14. As used in this chapter, "share" means:

(1) any share or similar security, any certificate of interest, any participation in any profit sharing agreement, any voting trust certificate, or any certificate of deposit for a share; and

(2) any security convertible, with or without consideration, into shares, or any warrant, call, or other option or privilege of buying shares without being bound to do so, or any other security carrying any right to acquire, subscribe to, or purchase shares.

Sec. 15. As used in this chapter, "share acquisition date", with respect to any person and any resident domestic corporation, means the date that the person first becomes an interested shareholder of the resident domestic corporation.

Sec. 16. As used in this chapter, "subsidiary" of any resident domestic corporation means any other corporation of which voting shares having a majority of the outstanding voting shares of the other corporation entitled to be cast are owned (directly or indirectly) by the resident domestic corporation.

Sec. 17. As used in this chapter, "voting shares" means shares of capital stock of a corporation entitled to vote generally in the election of directors.

Sec. 18. (a) Notwithstanding any other provision of this article (except sections 20 through 24 of this chapter), a resident domestic corporation may not engage in any business combination with any interested shareholder of the resident domestic corporation for a period of five (5) years following the interested shareholder's share acquisition date unless the business combination or the purchase of shares made by the interested shareholder on the interested shareholder's share acquisition date is approved by the board of directors of the resident domestic corporation before the interested shareholder's share acquisition date.

(b) If a good faith proposal regarding a business combination is made in writing to the board of directors of the resident domestic corporation, the board of directors shall respond, in writing, within thirty (30) days or such shorter period, if any, as may be required by the Exchange Act, setting forth its reasons for its decision regarding the proposal.

(c) If a good faith proposal to purchase shares is made in writing to the board of directors of the resident domestic corporation, the board of directors, unless it responds affirmatively in writing within thirty (30) days or such shorter period, if any, as may be required by the Exchange Act, is considered to have disapproved the share purchase.

Sec. 19. Notwithstanding any other provision of this article (except section 18 and 20 through 24 of this chapter), a resident domestic corporation may not engage at any time in any business combination with any interested shareholder of the resident domestic corporation other than a business combination meeting all requirements of the articles of incorporation of the domestic corporation and the requirements specified in any of the following:

(1) A business combination approved by the board of directors of the resident domestic corporation before the interested shareholder's share acquisition date, or as to which the purchase of shares made by the interested shareholder on the interested shareholder's share acquisition date had been approved by the board of directors of the resident domestic corporation before the interested shareholder's share acquisition date.

(2) A business combination approved by the affirmative vote of the holders of a majority of the outstanding voting shares not beneficially owned by the interested shareholder proposing the business combination, or any affiliate or associate of the interested shareholder proposing the business combination, at a meeting called for that purpose no earlier than five (5) years after the interested shareholder's share acquisition date.

(3) A business combination that meets all of the following conditions:

(A) The aggregate amount of the cash and the market value as of the consummation date of consideration other than cash to be received per share by holders of outstanding shares of common stock of the resident domestic corporation in the business combination is at least equal to the higher of the following:

(i) The highest per share price paid by the interested shareholder, at a time when the inter-

ested shareholder was the beneficial owner (directly or indirectly) of five percent (5%) or more of the outstanding voting shares of the resident domestic corporation, for any shares of common stock of the same class or series acquired by it within the five (5) year period immediately before the announcement date with respect to the business combination or within the five (5) year period immediately before, or in, the transaction in which the interested shareholder became an interested shareholder, whichever is higher; plus, in either case, interest compounded annually from the earliest date on which the highest per share acquisition price was paid through the consummation date at the rate for one (1) year United States Treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per share of common stock since the earliest date, up to the amount of the interest.

(ii) The market value per share of common stock on the announcement date with respect to the business combination or on the interested shareholder's share acquisition date, whichever is higher; plus interest compounded annually from that date through the consummation date at the rate for one (1) year United States Treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per share of common stock since that date, up to the amount of the interest.

(B) The aggregate amount of the cash and the market value as of the consummation date of consideration

other than cash to be received per share by holders of outstanding shares of any class or series of shares, other than common stock, of the resident domestic corporation is at least equal to the highest of the following (whether or not the interested shareholder has previously acquired any shares of the class or series of shares):

(i) The highest per share price paid by the interested shareholder, at a time when the interested shareholder was the beneficial owner (directly or indirectly) of five percent (5%) or more of the outstanding voting shares of the resident domestic corporation, for any shares of the class or series of shares acquired by it within the five (5) year period immediately before the announcement date with respect to the business combination or within the five (5) year period immediately before, or in, the transaction in which the interested shareholder became an interested shareholder, whichever is higher; plus, in either case, interest compounded annually from the earliest date on which the highest per share acquisition price was paid through the consummation date at the rate for one (1) year United States Treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per share of the class or series of shares since the earliest date, up to the amount of the interest.

(ii) The highest preferential amount per share to which the holders of shares of the class or series of shares are entitled in the event of any voluntary liquidation, dissolution, or winding up of the resident domestic corporation, plus the aggregate

amount of any dividends declared or due as to which the holders are entitled before payment of dividends on some other class or series of shares (unless the aggregate amount of the dividends is included in the preferential amount).

(iii) The market value per share of the class or series of shares on the announcement date with respect to the business combination or on the interested shareholder's share acquisition date, whichever is higher; plus interest compounded annually from that date through the consummation date at the rate for one (1) year United States Treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per share of the class or series of shares since that date, up to the amount of the interest.

(C) The consideration to be received by holders of a particular class or series of outstanding shares (including common stock) of the resident domestic corporation in the business combination is in cash or in the same form as the interested shareholder has used to acquire the largest number of shares of the class or series of shares previously acquired by it, and the consideration shall be distributed promptly.

(D) The holders of all outstanding shares of the resident domestic corporation not beneficially owned by the interested shareholder immediately before the consummation of the business combination are entitled to receive in the business combination cash or other consideration for the shares in compliance with clauses (A), (B), and (C).

(E) After the interested shareholder's share acquisition date and before the consummation date with respect to the business combination, the interested shareholder has not become the beneficial owner of any additional voting shares of the resident domestic corporation except:

(i) as part of the transaction that resulted in the interested shareholder becoming an interested shareholder;

(ii) by virtue of proportionate share splits, share dividends, or other distributions of shares in respect of shares not constituting a business combination under section 5(5) of this chapter;

(iii) through a business combination meeting all of the conditions of section 18 of this chapter and this section; or

(iv) through purchase by the interested shareholder at any price that, if the price had been paid in an otherwise permissible business combination the announcement date and consummation date of which were the date of the purchase, would have satisfied the requirements of clauses (A), (B), and (C).

Sec. 20. This chapter does not apply to any business combination of a resident domestic corporation that does not, as of the share acquisition date, have a class of voting shares registered with the Securities and Exchange Commission under Section 12 of the Exchange Act, unless the corporation's articles of incorporation provide otherwise.

Sec. 21. This chapter does not apply to any business combination of a resident domestic corporation the articles of incorporation of which have been amended to provide that the resident domestic corporation is subject to this chapter and that has not had a class of voting shares registered with the

Securities and Exchange Commission under Section 12 of the Exchange Act on the effective date of the amendment, and that is a business combination with an interested shareholder whose share acquisition date is before the effective date of the amendment.

Sec. 22. This chapter does not apply to any business combination of a resident domestic corporation:

(1) the original articles of incorporation of which contain a provision expressly electing not to be governed by this chapter;

(2) that, before the earlier of:

(A) September 1, 1987; or

(B) thirty (30) days after the date specified by a resolution of the board of directors adopted under IC 23-1-17-3(b), if the board of directors adopts such a resolution;

adopts an amendment to the resident domestic corporation's bylaws expressly electing not to be governed by this chapter; however, an election under this subdivision may be rescinded by subsequent amendment of the bylaws; or

(3) that adopts an amendment to the resident domestic corporation's articles of incorporation, approved by the affirmative vote of the holders, other than interested shareholders and their affiliates and associates, of a majority of the outstanding voting shares of the resident domestic corporation, excluding the voting shares of interested shareholders and their affiliates and associates, expressly electing not to be governed by this chapter, if the amendment to the articles of incorporation is not to be effective until eighteen (18) months after the vote of the resident domestic corporation's shareholders and does not apply to any business combination of the resident domestic corpo-

ration with an interested shareholder whose share acquisition date is on or before the effective date of the amendment.

Sec. 23. This chapter does not apply to any business combination of a resident domestic corporation with an interested shareholder of the resident domestic corporation who became an interested shareholder inadvertently, if the interested shareholder:

(1) as soon as practicable, divests itself of a sufficient amount of the voting shares of the corporation so that it no longer is the beneficial owner (directly or indirectly) of ten percent (10%) or more of the outstanding voting shares of the resident domestic corporation; and

(2) would not at any time within the five (5) year period preceding the announcement date with respect to the business combination have been an interested shareholder but for the inadvertent acquisition.

Sec. 24. This chapter does not apply to any business combination with an interested shareholder who was an interested shareholder on January 7, 1986.

SECTION 28. IC 23-1-44 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS:

Chapter 44. Dissenters' Rights.

Sec. 1. As used in this chapter, "corporation" means the issuer of the shares held by a dissenter before the corporate action, or the surviving or acquiring corporation by merger or share exchange of that issuer.

Sec. 2. As used in this chapter, "dissenter" means a shareholder who is entitled to dissent from corporate action under section 8 of this chapter and who exercises that right when and in the manner required by sections 10 through 18 of this chapter.

Sec. 3. As used in this chapter, "fair value", with respect to a dissenter's shares, means the value of the shares immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action unless exclusion would be inequitable.

Sec. 4. As used in this chapter, "interest" means interest from the effective date of the corporate action until the date of payment, at the average rate currently paid by the corporation on its principal bank loans or, if none, at a rate that is fair and equitable under all the circumstances.

Sec. 5. As used in this chapter, "record shareholder" means the person in whose name shares are registered in the records of a corporation or the beneficial owner of shares to the extent that treatment as a record shareholder is provided under a recognition procedure or a disclosure procedure established under IC 23-1-30-4.

Sec. 6. As used in this chapter, "beneficial shareholder" means the person who is a beneficial owner of shares held by a nominee as the record shareholder.

Sec. 7. As used in this chapter, "shareholder" means the record shareholder or the beneficial shareholder.

Sec. 8. (a) A shareholder is entitled to dissent from, and obtain payment of the fair value of the shareholder's shares in the event of, any of the following corporate actions:

(1) Consummation of a plan of merger to which the corporation is a party if:

(A) shareholder approval is required for the merger by IC 23-1-40-3 or the articles of incorporation; and

(B) the shareholder is entitled to vote on the merger.

(2) Consummation of a plan of share exchange to which the corporation is a party as the corporation whose shares

will be acquired, if the shareholder is entitled to vote on the plan.

(3) Consummation of a sale or exchange of all, or substantially all, of the property of the corporation other than in the usual and regular course of business, if the shareholder is entitled to vote on the sale or exchange, including a sale in dissolution, but not including a sale pursuant to court order or a sale for cash pursuant to a plan by which all or substantially all of the net proceeds of the sale will be distributed to the shareholders within one (1) year after the date of sale.

(4) The approval of a control share acquisition under IC 23-1-42.

(5) Any corporate action taken pursuant to a shareholder vote to the extent the articles of incorporation, bylaws, or a resolution of the board of directors provides that voting or nonvoting shareholders are entitled to dissent and obtain payment for their shares.

(b) This section does not apply to the holders of shares of any class or series if, on the date fixed to determine the shareholders entitled to receive notice of and vote at the meeting of shareholders at which the merger, plan of share exchange, or sale or exchange of property is to be acted on, the shares of that class or series were:

(1) registered on a United States securities exchange registered under the Exchange Act (as defined in IC 23-1-43-9); or

(2) traded on the National Association of Securities Dealers, Inc. Automated Quotations System Over-the-Counter Markets—National Market Issues or a similar market.

(c) A shareholder entitled to dissent and obtain payment for the shareholder's shares under this chapter may not chal-

lenge the corporate action creating the shareholder's entitlement.

Sec. 9. (a) A record shareholder may assert dissenters' rights as to fewer than all the shares registered in the shareholder's name only if the shareholder dissents with respect to all shares beneficially owned by any one (1) person and notifies the corporation in writing of the name and address of each person on whose behalf the shareholder asserts dissenters' rights. The rights of a partial dissenter under this subsection are determined as if the shares as to which the shareholder dissents and the shareholder's other shares were registered in the names of different shareholders.

(b) A beneficial shareholder may assert dissenters' rights as to shares held on the shareholder's behalf only if:

(1) the beneficial shareholder submits to the corporation the record shareholder's written consent to the dissent not later than the time the beneficial shareholder asserts dissenters' rights; and

(2) the beneficial shareholder does so with respect to all the beneficial shareholder's shares or those shares over which the beneficial shareholder has power to direct the vote.

Sec. 10. (a) If proposed corporate action creating dissenters' rights under section 8 of this chapter is submitted to a vote at a shareholders' meeting, the meeting notice must state that shareholders are or may be entitled to assert dissenters' rights under this chapter and be accompanied by a copy of this chapter.

(b) If corporate action creating dissenters' rights under section 8 of this chapter is taken without a vote of shareholders, the corporation shall notify in writing all shareholders entitled to assert dissenters' rights that the action was taken and send them the dissenters' notice described in section 12 of this chapter.

Sec. 11. (a) If proposed corporate action creating dissenters' rights under section 8 of this chapter is submitted to a vote at a shareholders' meeting, a shareholder who wishes to assert dissenters' rights:

(1) must deliver to the corporation before the vote is taken written notice of the shareholder's intent to demand payment for the shareholder's shares if the proposed action is effectuated; and

(2) must not vote the shareholder's shares in favor of the proposed action.

(b) A shareholder who does not satisfy the requirements of subsection (a) is not entitled to payment for the shareholder's shares under this chapter.

Sec. 12. (a) If proposed corporate action creating dissenters' rights under section 8 of this chapter is authorized at a shareholders' meeting, the corporation shall deliver a written dissenters' notice to all shareholders who satisfied the requirements of section 11 of this chapter.

(b) The dissenters' notice must be sent no later than ten (10) days after approval by the shareholders, or if corporate action is taken without approval by the shareholders, then ten (10) days after the corporate action was taken. The dissenters' notice must:

(1) state where the payment demand must be sent and where and when certificates for certificated shares must be deposited;

(2) inform holders of uncertificated shares to what extent transfer of the shares will be restricted after the payment demand is received;

(3) supply a form for demanding payment that includes the date of the first announcement to news media or to shareholders of the terms of the proposed corporate action and requires that the person asserting dissenters' rights certify whether or not the person acquired beneficial ownership of the shares before that date;

(4) set a date by which the corporation must receive the payment demand, which date may not be fewer than thirty (30) nor more than sixty (60) days after the date the subsection (a) notice is delivered; and

(5) be accompanied by a copy of this chapter.

Sec. 13. (a) A shareholder sent a dissenters' notice described in IC 23-1-42-11 or in section 12 of this chapter must demand payment, certify whether the shareholder acquired beneficial ownership of the shares before the date required to be set forth in the dissenter's notice under section 12(b)(3) of this chapter, and deposit the shareholder's certificates in accordance with the terms of the notice.

(b) The shareholder who demands payment and deposits the shareholder's shares under subsection (a) retains all other rights of a shareholder until these rights are cancelled or modified by the taking of the proposed corporate action.

(c) A shareholder who does not demand payment or deposit the shareholder's share certificates where required, each by the date set in the dissenters' notice, is not entitled to payment for the shareholder's shares under this chapter and is considered, for purposes of this article, to have voted the shareholder's shares in favor of the proposed corporate action.

Sec. 14. (a) The corporation may restrict the transfer of uncertificated shares from the date the demand for their payment is received until the proposed corporate action is taken or the restrictions released under section 16 of this chapter.

(b) The person for whom dissenters' rights are asserted as to uncertificated shares retains all other rights of a shareholder until these rights are cancelled or modified by the taking of the proposed corporate action.

Sec. 15. (a) Except as provided in section 17 of this chapter, as soon as the proposed corporate action is taken, or, if the transaction did not need shareholder approval and has been completed, upon receipt of a payment demand, the corporation shall pay each dissenter who complied with section 13 of this chapter the amount the corporation estimates to be the fair value of the dissenter's shares.

(b) The payment must be accompanied by:

(1) the corporation's balance sheet as of the end of a fiscal year ending not more than sixteen (16) months before the date of payment, an income statement for that year, a statement of changes in shareholders' equity for that year, and the latest available interim financial statements, if any;

(2) a statement of the corporation's estimate of the fair value of the shares;

(3) a statement of the dissenter's right to demand payment under section 18 of this chapter; and

(4) a copy of this chapter.

Sec. 16. (a) If the corporation does not take the proposed action within sixty (60) days after the date set for demanding payment and depositing share certificates, the corporation shall return the deposited certificates and release the transfer restrictions imposed on uncertificated shares.

(b) If after returning deposited certificates and releasing transfer restrictions, the corporation takes the proposed action, it must send a new dissenters' notice under section 12 of this chapter and repeat the payment demand procedure.

Sec. 17. (a) A corporation may elect to withhold payment required by section 15 of this chapter from a dissenter unless the dissenter was the beneficial owner of the shares before the date set forth in the dissenters' notice as the date of the first announcement to news media or to shareholders of the terms of the proposed corporate action.

(b) To the extent the corporation elects to withhold payment under subsection (a), after taking the proposed corporate action, it shall estimate the fair value of the shares and shall pay this amount to each dissenter who agrees to accept it in full satisfaction of the dissenter's demand. The corporation shall send with its offer a statement of its estimate of the fair value of the shares and a statement of the dissenter's right to demand payment under section 18 of this chapter.

Sec. 18. (a) A dissenter may notify the corporation in writing of the dissenter's own estimate of the fair value of the dissenter's shares and demand payment of the dissenter's estimate (less any payment under section 15 of this chapter), or reject the corporation's offer under section 17 of this chapter and demand payment of the fair value of the dissenter's shares, if:

(1) the dissenter believes that the amount paid under section 15 of this chapter or offered under section 17 of this chapter is less than the fair value of the dissenter's shares;

(2) the corporation fails to make payment under section 15 of this chapter within sixty (60) days after the date set for demanding payment; or

(3) the corporation, having failed to take the proposed action, does not return the deposited certificates or release the transfer restrictions imposed on uncertificated shares within sixty (60) days after the date set for demanding payment.

(b) A dissenter waives the right to demand payment under this section unless the dissenter notifies the corporation of the

dissenter's demand in writing under subsection (a) within thirty (30) days after the corporation made or offered payment for the dissenter's shares.

Sec. 19. (a) If a demand for payment under IC 23-1-42-11 or under section 18 of this chapter remains unsettled, the corporation shall commence a proceeding within sixty (60) days after receiving the payment demand and petition the court to determine the fair value of the shares. If the corporation does not commence the proceeding within the sixty (60) day period, it shall pay each dissenter whose demand remains unsettled the amount demanded.

(b) The corporation shall commence the proceeding in the circuit or superior court of the county where a corporation's principal office (or, if none in Indiana, its registered office) is located. If the corporation is a foreign corporation without a registered office in Indiana, it shall commence the proceeding in the county in Indiana where the registered office of the domestic corporation merged with or whose shares were acquired by the foreign corporation was located.

(c) The corporation shall make all dissenters (whether or not residents of this state) whose demands remain unsettled parties to the proceeding as in an action against their shares and all parties must be served with a copy of the petition. Nonresidents may be served by registered or certified mail or by publication as provided by law.

(d) The jurisdiction of the court in which the proceeding is commenced under subsection (b) is plenary and exclusive. The court may appoint one (1) or more persons as appraisers to receive evidence and recommend decision on the question of fair value. The appraisers have the powers described in the order appointing them or in any amendment to it. The dissenters are entitled to the same discovery rights as parties in other civil proceedings.

(e) Each dissenter made a party to the proceeding is entitled to judgment:

(1) for the amount, if any, by which the court finds the fair value of the dissenter's shares, plus interest, exceeds the amount paid by the corporation; or

(2) for the fair value, plus accrued interest, of the dissenter's after-acquired shares for which the corporation elected to withhold payment under section 17 of this chapter.

Sec. 20. (a) The court in an appraisal proceeding commenced under section 19 of this chapter shall determine all costs of the proceeding, including the reasonable compensation and expenses of appraisers appointed by the court. The court shall assess the costs against such parties and in such amounts as the court finds equitable.

(b) The court may also assess the fees and expenses of counsel and experts for the respective parties, in amounts the court finds equitable:

(1) against the corporation and in favor of any or all dissenters if the court finds the corporation did not substantially comply with the requirements of sections 10 through 18 of this chapter; or

(2) against either the corporation or a dissenter, in favor of any other party, if the court finds that the party against whom the fees and expenses are assessed acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by this chapter.

(c) If the court finds that the services of counsel for any dissenter were of substantial benefit to other dissenters similarly situated and that the fees for those services should not be assessed against the corporation, the court may award to these counsel reasonable fees to be paid out of the amounts awarded the dissenters who were benefited.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | |
|---|---|
| **DYNAMICS CORPORATION OF AMERICA,**<br>*Plaintiff,*<br>*v.*<br>**CTS CORPORATION, et al.,**<br>*Defendants.*<br><br>**CTS CORPORATION,**<br>*Defendant and Counterplaintiff,*<br>*v.*<br>**DYNAMICS CORPORATION OF AMERICA,**<br>*Plaintiff and Counterdefendant,*<br>*and*<br>**ANDREW LOZYNIAK, EDWARD J. MOONEY, HENRY V. KENSING, PATRICK J. DORME, FRANK A. GUNTHER, CURTIS T. ROFF, SAUL SPERBER, JOSEPH P. WALKER and HAROLD COHAN,**<br>*Additional Counterdefendants.* | **No. 86 C 1624**<br>**Judge Getzendanner** |

# CTS CORPORATION'S BRIEF IN OPPOSITION TO PLAINTIFF'S REQUEST FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AGAINST ENFORCEMENT OF THE CONTROL SHARE ACQUISITION PROVISIONS OF THE INDIANA BUSINESS CORPORATION LAW

before the control share acquisition only to the extent granted by resolution approved by the shareholders of the issuing public corporation." Before control shares are purchased, the acquiring party may (at its option) cause a special shareholder meeting to be called for the purpose of determining the voting rights of shares to be acquired in an anticipated control share acquisition. IND. CODE §§23-1-42-6, 23-1-42-7. In this case, DCA has not sought such a pre-purchase shareholder vote; thus, CTS' shareholders will decide the voting rights of DCA's control shares (if acquired) at the "next special or annual meeting of shareholders." IND. CODE §23-1-42-7(c).[3]

A resolution conferring voting rights on DCA's control shares must be approved by a majority of CTS' voting shares, excluding all interested shares. IND. CODE §23-1-42-9(b)(2). DCA's shares of CTS, as well as the shares owned by CTS' management, are within the set of "interested shares" excluded from the vote. IND. CODE §23-1-42-3. In short, before DCA's newly acquired control shares may be used to gain control of CTS' Board of Directors, DCA's control shares must be granted voting rights by a majority vote of all disinterested shares.

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[3] Practical and legal barriers prevent a shareholder vote on DCA's control shares at the scheduled April 25, 1986, annual meeting of CTS' shareholders. If DCA acquires control shares, which is far from inevitable in light of the Shareholders Rights Plan adopted by CTS' Board of Directors, a special shareholder meeting for the purpose of deciding the voting rights of those control shares will have to be called.

03/31 CTS CORP.—BUSINESS SALE—2—(DJ)

ELKHART, IND. —DJ— CTS CORP., WHICH SAID IT COMPLETED THE SALE OF ITS METAL STORE FIXTURES BUSINESS TO SYNDICATE SYSTEMS INC., FOR ABOUT $28 MILLION AND WILL POST A GAIN OF $7 MILLION OR $1.25 A SHARE IN THE FIRST QUARTER FROM THE SALE, HAD YEAR-AGO FIRST QUARTER NET OF $5.9 MILLION OR $1.02 A SHARE.

SEPARATELY, THE COMPANY SAID IT HAS ELECTED TO BE GOVERNED BY THE NEW INDIANA BUSINESS CORPORATION ACT. THE COMPANY SAID, AMONG OTHER CHANGES, THE NEW ACT PROVIDES THAT THE ACQUISITION OF OVER 20 PC OF THE OUTSTANDING SHARES OF THE COMPANY, SUBJECT TO THE ACT, WILL BE A "CONTROL SHARE ACQUISITION". CTS SAID SHARES ACQUIRED IN A CONTROL SHARE ACQUISITION CANNOT BE VOTED UNTIL HOLDERS OF A MAJORITY OF THE SHARES NOT OWNED BY THE ACQUIROR AND OFFICERS OF THE COMPANY GRANT VOTING RIGHTS TO THE PURCHASER. CTS SAID IT FILED SUIT IN STATE COURT IN INDIANA, SEEKING A DECLARATION THAT THE CONTROL SHARE ACQUISITION PROVISIONS OF THE ACT ARE VALID AND ENFORCEABLE.

AS REPORTED, DYNAMICS CORP. OF AMERICA, WHICH PRESENTLY OWNS 554,600 SHARES OF CTS, RECENTLY BEGAN A PARTIAL TENDER OFFER TO BUY UP TO AN ADDITIONAL ONE MILLION SHARES OF CTS AT $43 EACH. CTS SAID IF DYNAMICS BUYS MORE THAN 575,000 SHARES UNDER THIS OFFER, THE PURCHASE WOULD BE DEFINED AS A CONTROL SHARE ACQUISITION UNDER THE ACT.

CTS ALSO SAID IT FILED A COUNTERCLAIM AGAINST DYNAMICS AND ITS DIRECTORS IN THE CASE PENDING IN FEDERAL COURT IN CHICAGO BETWEEN THE TWO COMPANIES.

## CERTIFIED RESOLUTION
## OF THE BOARD OF DIRECTORS
## OF CTS CORPORATION

The undersigned officers of CTS Corporation (the "Corporation"), existing pursuant to the provisions of The Indiana General Corporation Act, as amended, desiring to give notice of corporate action effectuating application of the Indiana Business Corporation Law (except for certain provisions thereof), hereby certify that the following resolutions were duly adopted by the Board of Directors of the Corporation at a meeting thereof, duly called, constituted and held on March 27, 1986, at which a quorum of such Board of Directors were present; have not been amended or rescinded; and are in full force and effect:

> RESOLVED, That, pursuant to the procedure established in IC 23-1-17-3(b), the Board of Directors elects to have the provisions of IC 23-1-18 through IC 23-1-54 (except for IC 23-1-18-3, IC 23-1-21 and IC 23-1-53-3) apply to the Corporation on and after April 1, 1986; and
>
> RESOLVED FURTHER, That the officers of the corporation be, and the same hereby are, authorized and directed to file a certified copy of this resolution in the Office of the Secretary of State of the State of Indiana before April 1, 1986.

IN WITNESS WHEREOF, the undersigned officers execute this Certified Resolution of the Board of Directors of the Corporation, and certify to the truth of the facts herein stated, this 27th day of March, 1986.

| | |
|---|---|
| GARY B. EREKSON | JEANNINE M. DAVIS |
| Gary B. Erekson<br>Senior Vice President<br>and Chief Financial<br>Officer | Jeannine M. Davis<br>Secretary and<br>General Counsel |

STATE OF INDIANA }
COUNTY OF ELKHART } SS.:

I, the undersigned, a Notary Public duly commissioned to take acknowledgments and administer oaths in the State of Indiana, certify that Gary B. Erekson, Senior Vice President and Chief Financial Officer, and Jeannine M. Davis, Secretary and General Counsel, of the Corporation, the officers executing the foregoing Certified Resolution of the Board of Directors of the Corporation, personally appeared before me, acknowledged the execution thereof, and swore or attested to the truth of the facts therein stated.

WITNESS my hand and Notarial Seal this 27th day of March, 1986.

CONSTANCE P. POLLITT
*Notary Public*

CONSTANCE P. POLLITT
Printed Name

FILED MAR. 27, 1986

My Commission Expires: September 19, 1986

My County of Residence: Elkhart County

STATE OF INDIANA

OFFICE OF THE SECRETARY OF STATE

To Whom These Presents Come, Greeting:

WHEREAS, there has been presented to me at this office a Resolution of the Board of Directors electing to be governed by the provisions of the Indiana Business Corporation Law prior to August 1, 1987 of CTS CORPORATION and said Resolution having been prepared and signed in accordance with the provisions of the Indiana Business Corporation Law.

WHEREAS, upon due examination, I find that it satisfies the requirements of I.C. 23-1-17-3(b) and I.C. 23-1-18-1:

NOW, THEREFORE, I, EDWIN J. SIMCOX, Secretary of State of Indiana, hereby certify that I have this day filed the Resolution of the Board of Directors in this office.

Effective date the provisions will apply is April 1, 1986.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the State of Indiana, at the City of Indianapolis, this 27th day of March, 1986

______________________________

EDWIN J. SIMCOX
*Secretary of State,*

[Notary Seal]

By______________________________

*Deputy*

## CERTIFIED RESOLUTION OF THE BOARD OF DIRECTORS OF CTS CORPORATION

The undersigned officers of CTS Corporation (the "Corporation"), existing pursuant to the provisions of The Indiana General Corporation Act, as amended, desiring to give notice of corporate action effectuating application of the Indiana Business Corporation Law (except for certain provisions thereof), hereby certify that the following resolutions were duly adopted by the Board of Directors of the Corporation at a meeting thereof, duly called, constituted and held on March 27, 1986, at which a quorum of such Board of Directors were present; have not been amended or rescinded; and are in full force and effect:

> RESOLVED, That, pursuant to the procedure established in IC 23-1-17-3(b), the Board of Directors elects to have the provisions of IC 23-1-18 through IC 23-1-54 (except for IC 23-1-18-3, IC 23-1-21 and IC 23-1-53-3) apply to the Corporation on and after April 1, 1986; or as soon as possible after April 1, 1986, but in no event later than April 2, 1986; and
>
> RESOLVED FURTHER, That the officers of the Corporation be, and the same hereby are, authorized and directed to file a certified copy of this resolution in the Office of the Secretary of State of the State of Indiana on April 1, 1986.

IN WITNESS WHEREOF, the undersigned officers execute this Certified Resolution of the Board of Directors of the Corporation, and certify to the truth of the facts herein stated this 27th day of March, 1986.

| GARY B. EREKSON | JEANNINE M. DAVIS |
|---|---|
| Gary B. Erekson<br>Senior Vice President<br>and Chief Financial<br>Officer | Jeannine M. Davis<br>Secretary and<br>General Counsel |

STATE OF INDIANA }<br>COUNTY OF ELKHART } SS.:

I, the undersigned, a Notary Public duly commissioned to take acknowledgments and administer oaths in the State of Indiana, certify that Gary B. Erekson, Senior Vice President and Chief Financial Officer, and Jeannine M. Davis, Secretary and General Counsel, of the Corporation, the officers executing the foregoing Certified Resolution of the Board of Directors of the Corporation, personally appeared before me, acknowledged the execution thereof, and swore or attested to the truth of the facts therein stated.

WITNESS my hand and Notarial Seal this 27th day of March, 1986.

CONSTANCE P. POLLITT
*Notary Public*

CONSTANCE P. POLLITT
Printed Name

FILED APR. 1, 1986

My Commission Expires: September 19, 1988

My County of Residence: Elkhart County

## STATE OF INDIANA

## OFFICE OF THE SECRETARY OF STATE

To Whom These Presents Come, Greeting:

WHEREAS, there has been presented to me at this office a Resolution of the Board of Directors electing to be governed by the provisions of the Indiana Business Corporation Law prior to August 1, 1987 of CTS CORPORATION and said Resolution has been prepared and signed in accordance with the provisions of the Indiana Business Corporation Law.

WHEREAS, upon due examination, I find that it satisfies the requirements of I.C. 23-1-17-3(b) and I.C. 23-1-18-1:

NOW, THEREFORE, I, EDWIN J. SIMCOX, Secretary of State of Indiana, hereby certify that I have this day filed the Resolution of the Board of Directors in this office.

Effective date the provisions will apply is April 1, 1986.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the State of Indiana, at the City of Indianapolis, this 1st day of April, 1986

EDWIN J. SIMCOX
*Secretary of State,*

[Notary Seal]

By ______________________
*Deputy*

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| **DYNAMICS CORPORATION OF AMERICA,** *Plaintiff,* | | **DOCKET NO. 86 C 1624** |
| *vs.* | | |
| **CTS CORPORATION, et al.,** *Defendants.* | | **Chicago, Illinois March 28, 1986 9:30 o'clock a.m.** |

**TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE MILTON I. SHADUR, JUDGE**

**APPEARANCES:**

For the Plaintiff:

MR. LOWELL E. SACHNOFF
30 South Wacker Drive, Suite 2900
Chicago, Illinois 60606

For the Defendant:

MR. STEPHEN C. SANDELS
111 West Monroe Street
Chicago, Illinois 60603

JESSE ANDREWS
Official Court Reporter—U.S. District Court
219 S. Dearborn Street
Chicago, Illinois 60604
(312) 922-5955

that is so consistent with the Williams Act and the Federal Regulation, there can not be any clearly excessive burden on Interstate Commerce in relation to local benefits.

The MITE case itself and the Securities Exchange Act of 1934, come right out and say that protecting local investors is plainly a legitimate state objective. The Securities Exchange Act states, I believe in Section 28 — it is cited on page 10 of our brief that this— that the Exchange Act is not intended to take away the regulatory powers of the authorities of State Securities Acts and State Commissioners.

THE COURT: Isn't that odd that the Indiana whatever they call it I guess they don't call it the General Assembly — the Indiana Legislature didn't talk about investors at all?

MR. SANDELS: You mean Indiana shareholders.

THE COURT: Yes.

MR. SANDELS: Let me speak to that if I may.

THE COURT: Yes.

MR. SANDELS: CTS does have about one third of its shareholders in the State of Indiana.

THE COURT: Yes I understand. I am talking about simply because their attack has been a facial attack. And, I know what you saying about standing. But you know facial attacks — Graynet (phonetically) against the City of Rockford and all that whole string of cases deal with the proposition

March 1986 Volume Three, No. 3

A report on current contests for corporate control

# CORPORATE CONTROL ALERT

A publication of The American Lawyer

## LEGAL DEVELOPMENTS

### NEW YORK TAKEOVER STATUTE'S FIRST PROGENY

In December, when the New York legislature passed Governor Mario Cuomo's unique antitakeover legislation, several securities industry representatives predicted that other states would follow New York's lead and adopt similar statutes. It is too early to tell whether their predictions of an onslaught will prove to be correct, but Indiana has already chosen the New York approach. Also, Edward Reinfurt, vice-president of The Business Council of New York State, the principal business lobby in Albany and a strong supporter of the New York law, says that several other states have similar legislation under study.

The approach of the New York statute, which is viewed as a substantial deterrent to hostile takeovers, is to force potential acquirers of New York companies to gain the approval of the target's board before acquiring a significant stake in the company — 20% in the case of New York's law. Any acquirer that fails to get the required approval cannot do a merger, liquidate the target, acquire assets from the target, or do certain other specified transactions for five years. After five years, any contemplated transaction with the 20% holder has to be approved by holders of a majority of the outstanding shares, other than the larger holder, or meet certain fair price provisions set forth in the statute.

The statute adopted by the Indiana legislature — and awaiting the governor's signature — is substantially similar to the New York statute except that Indiana's ownership threshold is 10%. The purpose of the statute, says Paul Corsaro, a corporate specialist from Indianapolis's Bingham Summers Welsh & Spilman, is to "make it very, very difficult to take over an Indiana company."

When asked why Indiana had decided to adopt such a virulent statute, James Strain, an Indianapolis corporate lawyer from Barnes & Thornburg, says, "We don't like having all our companies taken over by East Coast firms." On further reflection, Strain says Midwestern and West Coast acquirers are no better.

In the past year, two large Indiana public companies, Hook Drugs, Inc., and Central Soya Company, Inc., were the targets of takeover bids. Hook agreed to merge with The Kroger Co. to avoid a takeover by Rite Aid Corporation, and Central Soya reached an accommodation with bidder Shamrock Holdings Inc., a private investment company owned by the Roy Disney family. There are other large public Indiana companies, including Amoco Corporation, Cummins Engine Company, Inc., and Eli Lilly and Company, that would benefit from the protection of the statute.

An Indiana lawyer familiar with the process says that the Indiana business community supported the legislation with varying degrees of enthusiasm but did not formally lobby for its passage. The impetus came primarily from the committee of Indiana lawyers appointed by the secretary of state that proposed the statute and the legislators themselves who strongly supported it. No dissenting votes were cast in either house of the legislature.

*March 1986*

Volume Three, No. 4 April 1986

A report on current contests for corporate control

# CORPORATE CONTROL ALERT

A publication of The American Lawyer

## STRATEGIES

### 1985—RECORD-BREAKING YEAR

The installation of a new computer system at W.T. Grimm & Co. kept the Chicago-based compiler of M&A data from disseminating its regular quarterly reports on takeover activity as 1985 progressed. So through the year, takeover lawyers and bankers had to rely on their intuition and deposit slips to tell them that 1985 was a record-breaking year. Now Grimm's new data processing system is up and running: it has finally digested the staggering quantity of data the M&A community has dished up, and the results, though not unexpected, are mind-boggling nonetheless. Here are some of the details.

In 1985, Grimm counted 3,001 transactions announced and completed or pending as of December 31, 1985. To be included in Grimm's statistics, says Tomislava Simic, Grimm's vice-president — research, a deal must have at least one U.S. party and a purchase price of $500,000 or more, and involve a formal transfer of ownership involving 10% or more of a company's equity or assets. The transactions counted include mergers, acquisitions, LBOs, and divestitures, but not open market purchases of stock. In 1985, the total purchase price of those deals was a record-breaking $179.6 billion, up 47% from 1984's $122.2 billion. Thirty-six of those deals, totaling $92.7 billion, exceeded the billion-dollar mark. That is twice the then-considered astounding 18 billion-dollar-plus deals announced in 1984. Those 36 deals totaled more than half the total value of all the 1985 deals.

In 1984, the billion-dollar deals were concentrated in the oil industry. Included were Standard Oil Company of Califor-

nia's $13.2 billion purchase of Gulf Oil Corporation; Texaco Inc.'s $10.1 billion purchase of Getty Oil Corp.; and Mobil Corporation's $5.7 billion purchase of Superior Oil Company. In 1985, the billion-dollar deals covered a wide range of industries, including broadcasting — the $3.5 billion purchase of American Broadcasting Companies by Capital Cities Communications Inc.; food processing — the $5.6 billion purchase of General Foods Corporation by Philip Morris Companies, Inc.; drugs and medical supplies — the $3.7 billion purchase of American Hospital Supply Corp. by Baxter Travenol Laboratories, Inc.; and aerospace — the $5 billion purchase of Hughes Aircraft Company by General Motors Corporation.

Grimm says its statistics include three "historical record breakers" among the 1985 billion-dollar deals: General Electric Company's $5.97 billion acquisition of RCA Corporation will be the largest non-oil acquisition in U.S. corporate history; the $5.36 billion buyout of Beatrice Companies, Inc. by Kohlberg Kravis Roberts & Co. will be the largest going-private transaction ever done; and Allied-Signal Inc.'s $1.7 billion divestiture of Union Texas Petroleum to a group led by Union's management and KKR is the largest unit-management buyout.

The following chart sets forth some of Grimm's findings (dollars in billions):

| | 1985 | 1984 | Change |
|---|---|---|---|
| Deals completed or pending | 3,001 | 2,543 | +18% |
| Dollar value paid or to be paid | $179.6 | $122.2 | +47% |
| Deals over $1 billion | 36 | 18 | +100% |
| Dollar value of billion-dollar deals | $92.7 | $58.1 | +60% |
| Deals over $100 million | 267 | 200 | +34% |
| Divestitures | 1,218 | 900 | +35% |
| Acquisitions of public companies | 336 | 211 | +59% |
| Acquisitions by foreign buyers | 197 | 151 | +30% |
| Going-private transactions | 76 | 57 | +33% |
| Dollar value of going-private transactions | $24.1 | $10.8 | +123% |
| Average price/earnings ratio paid | 18.0 | 17.2 | +4.7% |
| Average premium for public companies | 37.1% | 37.9% | –2.2% |

*April 1986*

(9)

No. 86-97

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF INDIANA,

*Intervenor-Appellant,*

VS.

DYNAMICS CORPORATION OF AMERICA,

*Appellee.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

# BRIEF OF INTERVENOR-APPELLANT STATE OF INDIANA

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130 pp

## QUESTIONS PRESENTED

1. Whether the Control Share Acquisitions Chapter of the Indiana Business Corporation Law, Ind. Code Ann. §§ 23-1-42-1 to -11 (Burns Cum. Supp. 1986), which makes the post-acquisition voting rights of "control shares" of covered Indiana corporations subject to a majority vote of existing shareholders, is unconstitutional under the Supremacy Clause of the Constitution of the United States, U.S. Const. art. VI, cl. 2, because preempted by the Williams Act, 15 U.S.C. §§ 78m(d)-78m(e), 78n(d)-78n(f) (1982 & Supp. III 1985), which federal statute regulates only

disclosures to shareholders and the purchase of shares in tender offers.

2. Whether the Control Share Acquisitions Chapter, which does not discriminate against interstate commerce or out-of-state residents, applies only to Indiana corporations with other substantial ties to the State, and regulates shareholder voting rights as a matter of the State's general corporation law governing the internal affairs of Indiana corporations, is unconstitutional under the Commerce Clause of the Constitution of the United States, U.S. Const. art. I, § 8, cl. 3.

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## OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, was issued on April 9, 1986. Dynamics Corp. of America v. CTS Corp., 637 F. Supp. 389 (N.D. Ill. 1986). It is contained in the Appendix to the Jurisdictional Statement filed with this Court by Appellant CTS Corporation in Docket No. 86-71, which appeal has been consolidated with the instant appeal. (CTS App. A29)* The supplemental opinion of the District Court was issued on April 16, 1986. Dynamics Corp. of

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* References to "(CTS App. ________)" are to the Appendix submitted in connection with the Jurisdictional Statement of CTS Corporation, upon which the Intervenor-Appellant relies.

America v. CTS Corp., 637 F. Supp. 389, 400 (N.D. Ill. 1986) (CTS App. A88). The final opinion of the United States Court of Appeals for the Seventh Circuit was issued on June 9, 1986.* Dynamics

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* Rule 15.1.(b) LISTING: In Seventh Circuit No. 86-1601, containing the constitutional issues presented by this appeal, the parties were Dynamics Corporation of America ("DCA") as Plaintiff-Appellee; CTS Corporation ("CTS") and Robert Hostetler, Gary Erekson, and Joseph DiGirolamo, in their respective capacities as officers and/or directors of CTS, as Defendants-Appellants; and the State of Indiana, as Intervenor-Appellant. Seventh Circuit No. 86-1608 involved the same action in the District Court, and was consolidated with No. 86-1601 for decision by the Seventh Circuit (CTS App. A13), but did not involve the questions presented in this appeal.

Rule 28.4.(c) Listing: By its Memorandum Opinion and Order in Dynamics Corporation of America v. CTS Corporation, 637 F. Supp. 389, 406 (N.D. Ill. 1986), the United States District Court for the Northern District of Illinois, Eastern Division, certified the

<u>Corp. of America v. CTS Corp.</u>, 794 F.2d 250 (7th Cir. 1986) (CTS App. A1).

<u>JURISDICTION</u>

This civil action was commenced in the United States District Court for the Northern District of Illinois, Eastern Division, by Appellee Dynamics Corporation of America ("DCA") against Appellant CTS Corporation ("CTS") and others. As relevant to this appeal, the complaint alleged that the Control Share Acquisitions Chapter of the Indiana Business Corporation Law, Ind. Code Ann. §§ 23-1-42-1 to -11 (Burns Cum. Supp.

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(footnote continued)

judgment in that case for immediate appeal and certified "the appeal" under 28 U.S.C. § 2403(b) (1982) to the Indiana Attorney General for purposes of intervention. (CTS App. 125).

1986) (the "Indiana Statute"), is unconstitutional because it violates the Supremacy Clause, U.S. Const. art. VI, cl. 2, and the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, of the Constitution of the United States. Federal jurisdiction was based upon 15 U.S.C. § 78aa, 28 U.S.C. §§ 1331 and 1332 (1982), and the doctrine of pendent jurisdiction.

In its opinions dated April 9 and 16, 1986 the District Court held the Indiana Statute unconstitutional, 637 F. Supp. 389 (CTS App. A88), and on April 16, 1986 it entered judgment in favor of DCA on this issue and certified its judgment for immediate appeal under 28 U.S.C., Fed. R. Civ. P. 54(b) (1982). 637 F. Supp. at 406 (CTS App. A124, A139). By that same opinion the

District Court also for the first time certified the appeal to the Attorney General of the State of Indiana pursuant to 28 U.S.C. § 2403(b) (1982). Id. (CTS App. A124-25). That statute provides that a state is entitled to intervene in any action, suit or proceeding in a court of the United States "wherein the constitutionality of any statute of that State affecting the public interest is drawn in question." The Indiana Attorney General did not receive certification pursuant to 28 U.S.C. § 2403(b) until after the conclusion of proceedings in the District Court and was unable to present evidence or argument in the action. 637 F. Supp. at 400 (CTS App. A89).

On April 19, 1986, Intervenor-Appellant filed a motion to intervene in

an appeal taken by CTS to the United States Court of Appeals for the Seventh Circuit (the "Seventh Circuit") from the judgment of the District Court entered in accordance with its opinions holding the Indiana Statute to be unconstitutional on both Supremacy and Commerce Clause grounds. (App. A7).* The Seventh Circuit issued an order granting the State's motion to intervene on April 22, 1986. (App. A11). On April 23, 1986, the Seventh Circuit entered its judgment and an order affirming the judgment of the District Court (CTS App. A126, A129) and on June 9, 1986 issued its opinion addressing

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* References to "(App. ___)" are to the Appendix filed by Intervenor-Appellant State of Indiana with its Jurisdictional Statement.

the constitutional issues presented. 794 F.2d 250 (CTS App. A1).

The State of Indiana timely filed a notice of appeal to this Court in the Seventh Circuit on April 25, 1986. (App. A1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(2) (1982).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

Relevant portions of the First and Sixth Articles of the United States Constitution, the Williams Act of 1968 and the Indiana Business Corporation Law are set forth at page A140 of the Appendix to the Jurisdictional Statement of Appellant CTS Corporation filed in connection with its Jurisdictional Statement in Docket No. 86-71, which appeal has been consolidated with this appeal.

## STATEMENT OF THE CASE

Appellee Dynamics Corporation of America ("DCA"), a New York corporation with its principal place of business in Connecticut, announced a tender offer on March 10, 1986, for at least 1,000,000 of the approximately 5,700,000 outstanding voting shares of Appellant CTS Corporation ("CTS"), an Indiana corporation with its principal place of business in Indiana. As DCA already owned approximately 9.6% of CTS' outstanding voting shares, consummation of the tender offer would have given it approximately 27.5% of such shares. On the same date DCA announced a proxy contest to elect its own candidates to the CTS board of directors at CTS' annual meeting scheduled for April 25, 1986.

On March 10, 1986, DCA filed this action, which originally alleged claims unrelated to this appeal, in the United States District Court for the Northern District of Illinois, Eastern Division. Upon CTS' election to be governed by the new Indiana Business Corporation Law, including the Control Share Acquisitions Chapter described below, DCA amended its complaint to seek an injunction against enforcement of that Statute on the ground that its provisions are unconstitutional under the Supremacy and Commerce Clauses of the Constitution.

On March 4, 1986, Indiana enacted a new Business Corporation Law, Ind. Code Ann. §§ 23-1-17-1 to 23-1-54-2 (Burns Cum. Supp. 1986), which revises the State's corporation code and which

contains a chapter entitled "Control Share Acquisitions." Ind. Code Ann. §§ 23-1-42-1 to -11 (CTS App. A167) (the "Indiana Statute"). While the new law becomes applicable to all Indiana corporations on August 1, 1987, corporations may elect to be governed by its provisions prior to that date. Ind. Code Ann. § 23-1-17-3. CTS elected to be governed by the new law effective April 1, 1986. Dynamics Corp. v. CTS Corp., 637 F. Supp. at 391 (CTS App. A33).

The Statute does not govern or regulate tender offers for shares of subject Indiana corporations, nor the purchase, sale or transfer of such shares. Rather, it supplements the portions of the new Indiana Business Corporation Law governing voting rights

of shareholders of Indiana corporations. The Statute governs the voting power of "control shares" of Indiana corporations, which are defined as acquired voting shares which, when aggregated with all other shares of the corporation owned by the acquirer, pass one of three thresholds of voting power--20%, 33.3% or 50%. Ind. Code Ann. § 23-1-42-1. A person who acquires control shares may not vote them until the shares are granted voting rights by a majority vote of the existing disinterested shareholders. Ind. Code Ann. § 23-1-42-5 to -9. The procedure for obtaining the requisite shareholder vote is described below.*

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* See <u>infra</u>, discussion at 31.

The Indiana Statute applies to any Indiana corporation* with 100 or more shareholders that has its principal place of business, its principal office, or substantial assets within Indiana. Application of the Statute is further limited to corporations in which a substantial number of the shares are held by, or a substantial number of

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* The term "corporation" is defined for purposes of the Business Corporation Law, including the Control Share Acquisitions Chapter, as "a corporation for profit that is not a foreign corporation, incorporated under or subject to the provisions of this Article." Ind. Code Ann. § 23-1-20-5. The Seventh Circuit recognized in its opinion that the Control Share Acquisitions Chapter applies only to corporations "incorporated in Indiana." 794 F.2d at 260 (CTS App. A19). See also Ind. Code Ann. § 23-1-49-5(c) ("This article does not authorize Indiana to regulate the organization or internal affairs of a foreign corporation authorized to transact business in Indiana.").

shareholders are, Indiana residents. Ind. Code Ann. § 23-1-42-4(a). Corporations may elect not to be subject to the Statute. Ind. Code Ann. § 23-1-42-5.

The United States District Court for the Northern District of Illinois, Eastern Division, and, on appeal, the United States Court of Appeals for the Seventh Circuit, ruled that the Indiana Statute is unconstitutional under the Supremacy and Commerce Clauses of the Constitution.

## SUMMARY OF ARGUMENT

A. 1. The Indiana Statute, which makes the post-acquisition voting rights of "control shares" of covered Indiana corporations subject to a majority vote of existing shareholders, is not unconstitutional under the Supremacy

Clause because preempted by the Williams Act, a federal statute which regulates certain aspects of tender offers. The provisions of the Indiana Statute do not conflict with those of the Williams Act. The unambiguous language of Section 28 of the Securities Exchange Act of 1934 (of which the Williams Act is an integral part) requires a finding that the Williams Act does not preempt state laws which, like the Indiana Statute, are not inconsistent with its actual provisions.

2. The court below rested its preemption holding on its conclusion that the Indiana Statute "stands as an obstacle to the accomplishment and execution of the full purposes or objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67-68 (1941).

It reasoned that Congress intended in enacting the Williams Act to "[strike] a balance between target management and tender offeror that states may not upset." Dynamics Corp. v. CTS Corp., 794 F.2d 250, 262 (7th Cir. 1986) (CTS App. A21). However, nothing in the legislative history of the Williams Act suggests that Congress intended the policy of neutrality embodied in its own legislation to preempt state laws simply because they might make tender offers more difficult.

3. In any event, the Indiana Statute is not inconsistent with any policy of neutrality that may underlie the Williams Act. Nothing in the Statute delays the commencement of a tender offer or prevents its consummation as soon as permissible

under the Williams Act. The unsupported conclusion of the Seventh Circuit that the practical impact of the Statute is to delay consummation of a tender offer for fifty days (as contrasted with the 28 day average waiting period under the Williams Act) fails to take into consideration the alternatives available to the tender offeror. Furthermore, the Indiana Statute leaves the decision on the fairness of the offer with the shareholders, a result consistent with the policy the plurality in MITE discerned in the Williams Act of letting shareholders make "their own informed choice." Edgar v. MITE, 457 U.S. 624, 634 (1982).

B. 1. The Indiana Statute, which does not regulate commerce, is not unconstitutional under the Commerce Clause. Nothing in the Commerce Clause

requires Indiana to resolve voting rights or other corporate governance issues in any particular way so long as the State does not discriminate against interstate commerce. Because Indiana has the right to determine the property right characteristics of the shares of its domestic coporations which are for sale in interstate commerce, the Indiana Statute is not subject to attack on Commerce Clause grounds.

2. In any event, the Statute passes constitutional muster under the test applied in "dormant" Commerce Clause cases because any incidental burden the Statute may impose on interstate commerce is not excessive in relation to the benefits it confers upon shareholders of Indiana corporations. Pike v. Bruce Church, Inc., 397 U.S.

137 (1970). The Indiana Statute is far more narrowly drawn than--indeed it bears no resemblance to--the Illinois Act struck down in MITE. Accordingly, it does not have the "sweeping extraterritorial effect" that concerned the Court in MITE.

3. Because the Indiana Statute is addressed to the internal affairs of Indiana corporations, the provisions of the Statute of necessity apply to all shareholders of covered Indiana corporations. Indeed, no other state has the right or power to protect shareholders of Indiana corporations through the medium of laws relating to corporate governance. Thus, in performing the "local benefits analysis" of Pike v. Bruce Church, the inquiry must be whether Indiana had a legitimate

interest in enacting the Indiana Statute for the benefit of all shareholders of Indiana corporations.

4. The Indiana Statute protects shareholders of Indiana corporations by permitting the majority of disinterested shareholders to decide whether a material change in voting control of the corporation is in its best interest. It permits shareholders to determine the intentions of any offeror concerning how it will run the business, whether it will abuse its ability to control the corporation and whether it will liquidate the company or remove it from the State. In the case of tender offers, the Statute permits shareholders to evaluate the merits of partial or two-tier offers without coercion. Shareholders confronted with a partial

or two-tier offer can collectively evaluate the merits of the whole offer without being stampeded into accepting an undesirable offer out of fear of losing an attractive initial premium.

5. No evidence was introduced in the court below that the Statute would, as a practical matter, burden interstate commerce. The Statute will not delay the commencement or consummation of tender offers, the principal such supposed burden which prompted the Seventh Circuit to strike down the Statute on Commerce Clause grounds. Moreover, the requirement of a shareholder vote should not adversely affect tender offers attractive to a majority of the disinterested shareholders since, as a practical matter, it would be in such shareholders' best interests to both

tender their shares and vote to confer voting rights.

ARGUMENT

The Indiana statute does not regulate or interfere with the acquisition--by tender offer, open market or private purchases or otherwise--of shares of the Indiana corporations it governs. Rather, it regulates the circumstances under which a person acquiring control shares of an Indiana corporation is entitled to vote them. Accordingly, the Statute deals with the corporate governance of Indiana corporations, specifically the circumstances under which a person who purchases "control shares" may use the voting power of the shares to influence or control the corporation.

This Court addressed Supremacy and Commerce Clause issues in a substantially different context in Edgar v. MITE Corp., 457 U.S. 624 (1982), in which it held the Illinois Business Takeover Act (the "Illinois Act") unconstitutional. The differences between the Illinois Act and the Indiana Statute are so great as to render MITE of limited utility in addressing the issues raised in this case:

1. The Illinois Act regulated the takeover bid process itself. 457 U.S. at 626-27. The Indiana Statute does not regulate the acquisition of shares by tender offer or otherwise, but rather regulates the internal affairs of Indiana corporations.

2. By imposing a twenty business day precommencement notification

requirement on offerors and by permitting a state-administered hearing of unlimited duration on the adequacy of the offeror's disclosure and the fairness of its offer, the Illinois Act introduced "extended delay into the tender offer process." Id. at 637. The Indiana Statute does not, either by its terms or by its practical impact, delay the commencement or consummation of tender offers for shares of Indiana corporations.*

3. The Illinois Act allowed the Illinois Secretary of State to "pass on the substantive fairness of a tender offer," which the plurality in MITE found in conflict with the approach adopted in the Williams Act. Id. at

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* See infra, discussion at 62-73.

639-40. The Indiana Statute leaves with shareholders the decision of whether the offer is fair.*

4. The Illinois Act had a "sweeping extraterritorial effect" because it applied to

> every tender offer . . . meeting two of the following conditions: the corporation has its principal executive office in Illinois, is organized under Illinois laws, or has at least 10% of its stated capital and paid-in surplus represented in Illinois.

Id. at 642. Accordingly, it applied even if none of the target corporation's shareholders resided in Illinois. Id. The Indiana Statute, which applies only to Indiana corporations having substantial numbers of Indiana shareholders and other significant

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* See infra, discussion at 74-77.

contacts with the State, has no such sweeping extraterritorial effect.*

No evidence was introduced in the courts below concerning the practical impact of the Indiana Statute.** Nevertheless, Judge Posner made his own assessment that the Statute is a "lethal dose" for tender offers because "[v]ery few tender offers could run the gauntlet that Indiana has set up." Dynamics Corp. of America v. CTS Corp., 794 F.2d 250, 263 (7th Cir. 1986) (CTS App. A23). Aside from his unsupported (and erroneous) conclusion

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* See infra, at 105-08.

** The Attorney General of Indiana did not receive certification from the District Court pursuant to 28 U.S.C. § 2403(b) until after the conclusion of the proceedings in that court and was unable to present such evidence in the action. See infra, note at 29, 30.

that the Statute imposes a fifty day delay on the consummation of tender offers, Judge Posner leaves us in the dark concerning the basis for his findings. Yet his decision that the Statute is unconstitutional on both Supremacy and Commerce Clause grounds hinges not on its subject matter but on its supposed practical impact.

## I. THE INDIANA STATUTE IS NOT PREEMPTED BY THE WILLIAMS ACT.

Despite obvious "doubts of the Williams Act's preemptive intent," 794 F.2d at 262 (CTS App. A23), the Seventh Circuit struck down the Indiana Statute as unconstitutional under the Supremacy Clause. It accepted the reasoning that Congress in the Williams Act had "struck a delicate balance between the contending factions" in takeover contests that states must respect and

held that the Indiana Statute "upsets the balance struck." Id. We demonstrate below that the Williams Act does not preempt state corporate governance statutes such as the Indiana Statute simply because they may not be neutral in tender offers for corporate control. We further demonstrate that in any event the Indiana Statute is not inconsistent with any policy of neutrality which may underlie the Williams Act.

The context in which the decision on preemption must be made is respect for the authority of states to make laws -- particularly in areas traditionally governed by the states. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). Few fields have been so consistently and completely occupied by

the states as the regulation of the internal affairs of their domestic corporations. Only an "unambiguous congressional mandate" would justify a finding of federal preemption of a state statute regulating shareholder voting rights. Cf. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 147 (1963).

A. The Subject Matters of the Indiana Statute and the Williams Act Are Entirely Different.

The Indiana Statute governs the voting power of "control shares," defining that term as acquired voting shares that, when aggregated with all other shares of the corporation owned by the acquirer, pass one of three thresholds of voting power. Ind. Code Ann. § 23-1-42-1. The Statute applies regardless of the method by which the

shares are acquired -- whether by tender offer or by open market or private purchases. Only the control shares themselves, and not shares previously owned by the acquirer, are subject to the provisions of the Statute. A person who acquires control shares may not vote them until the shares are accorded voting rights by a majority vote of existing disinterested shareholders-- that is, all shareholders except the acquirer and the officers and inside directors of the corporation. Ind. Code Ann. § 23-1-42-9.* Corporations may, in

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* The Indiana Legislature did not intend that incumbent management be permitted to vote on the voting rights issue, and the Seventh Circuit evidently construed the statute as preventing them from doing so. Dynamics, 794 F.2d at 261 (CTS App. A20). While Section 9 of the statute is ambiguous in this regard, the Legislature included

their articles of incorporation or by-laws, elect to be exempt from the

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(footnote continued)

Section 9(b)(1) only to ensure the right of a class of shareholders to vote as a separate voting group if the proposed control share acquisition would result in any of the changes described in Ind. Code Ann. § 23-1-38-4(a), which relates to changing the provisions of or reclassifying classes of a corporation's stock. Intervenor-Appellant was not able to present evidence to the District Court as to the Statute's proper construction and intent, "[b]ecause the Indiana Attorney General [was not] properly certified pursuant to 28 U.S.C. § 2403(b) . . ." Dynamics Corp. of America v. CTS Corp., 637 F. Supp. 389, 400 (N.D. Ill. 1986) (CTS App. A89). As the Indiana Attorney General informed the Seventh Circuit, however, CTS has only one class of common stock, and Section 9(b)(1) is thus irrelevant to any shareholder election on the voting rights issue in this case. Brief of Intervenor-Appellant State of Indiana at 9, Dynamics Corp. of America v. CTS Corp., 794 F.2d 250 (7th Cir. 1986) (No. 86-1601).

provisions of the Statute. Ind. Code Ann. § 23-1-42-5.

To obtain the necessary shareholder vote, any person who "proposes to make or has made" an acquisition of control shares may deliver an "acquiring person statement" to the corporation and request a special meeting of shareholders to determine whether voting rights will be accorded. Ind. Code Ann. § 23-1-42-6. The corporation must then set a record date and hold a shareholders' meeting within fifty days to vote on this issue. Ind. Code Ann. § 23-1-42-7(a) and 8(a).

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(footnote continued)

Resolution of this issue of precisely who is entitled to vote is, however, largely irrelevant to the constitutional issues posed in this case.

In sharp contrast, the Williams Act, 15 U.S.C. §§ 78m(d)-78m(e), 78n(d)-78n(f) (1982 & Supp. III 1985) (CTS App. A141), which was adopted in 1968 as an integral part of the Securities Exchange Act of 1934, 15 U.S.C. § 78a _et seq_. (1982 & Supp. III 1985) (the "1934 Act"), does not purport to govern voting rights of shareholders of corporations organized under the laws of the various states. Rather, the Act requires that upon commencement of a tender offer, the offeror provide shareholders of the target company with certain information about the offer. 15 U.S.C. § 78n(d)(1); 17 C.F.R. § 240.14d-3 (1986). It requires that the offer remain open for not less than twenty business days. 17 C.F.R. § 240.14e-1(a). It also provides that

shareholders who tender their shares may withdraw them during the first fifteen days of a tender offer and, if the offeror has not purchased them, at any time after sixty days from the commencement of the offer. 15 U.S.C. § 78n(d)(5); 17 C.F.R. § 240. 14d-7. All shares tendered must be purchased for the same price and on a pro rata basis if the offer is oversubscribed. 15 U.S.C. §§ 78n(d)(6) and (7). The Williams Act does not regulate purchases and sales of stock which are accomplished by means other than a tender offer. _See_, _e.g._, _Hanson Trust PLC v. SCM Corp._, 774 F.2d 47, 56 (2d Cir. 1985).

B. <u>There Is No Conflict Between the Provisions of the Williams Act and Those of the Indiana Statute, and the Indiana Statute Is Therefore Not Preempted.</u>

As the Seventh Circuit implicitly recognized, there is no conflict between the <u>provisions</u> of the Indiana Statute and the <u>provisions</u> of the Williams Act. It is possible for an acquirer to comply with the provisions of both laws when purchasing control shares of an Indiana corporation. Under such circumstances, the plain language of the federal statute being construed, the 1934 Act, requires a finding that the Indiana Statute is not preempted by the Williams Act.

Section 28 of the 1934 Act states that:

> Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any

> State over any security or any person <u>insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder</u>.

15 U.S.C. § 78bb(a) (1982) (emphasis added). The provisions of the Indiana Statute, which deal with the voting rights of control shares, do not conflict with the "provisions" of the Williams Act. Accordingly, the plain meaning of the language of the 1934 Act requires a finding that Congress did not intend that the <u>policy</u> reflected in the Act be the basis for preempting state laws not inconsistent with its actual provisions.*

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* State law savings clauses are also found in each of the other federal securities statutes--the Securities Act of 1933 (15 U.S.C. § 77r (1982)), the Public Utility Holding Company Act of 1935 (15 U.S.C. § 79u (1982)), the Trust Indenture Act of 1939 (15 U.S.C. § 77zzz (1982)), the

This Court has frequently held that the plain meaning of a statute must be given effect and that the legislative history of an unambiguous statute is almost always irrelevant:

> Notwithstanding petitioners' argument to the contrary, we are satisfied that the statutory language with which we deal has a plain and unambiguous meaning. While we now turn to the legislative history as an additional tool of analysis, we do so with the recognition that only the most extraordinary showing of contrary intentions from those data would justify a limitation on the 'plain meaning' of the statutory language.

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(footnote continued)

Investment Company Act of 1940 (15 U.S.C. § 80a-49 (1982)) and the Investment Advisers Act of 1940 (15 U.S.C. § 80b-18a (1982))--further demonstrating that the federal securities laws were not intended to preempt state laws in the absence of conflicting provisions. See generally Warren, Reflections on Dual Regulation of Securities: A Case Against Preemption, 25 B.C.L. Rev. 495 (1984).

> When we find the terms of a statute unambiguous, judicial inquiry is complete, except in '"rare and exceptional circumstances"'.

Garcia v. United States, 469 U.S. 70, 75 (1984). See also United States v. Oregon, 366 U.S. 643, 648 (1961) ("Having concluded that [its] provisions . . . are clear and unequivocal on their face, we find no need to resort to the legislative history of the Act.") (footnote omitted).

This Court should therefore find that in view of the unambiguous language of Section 28 of the 1934 Act (the only statutory expression of congressional intent on the subject), the Indiana Statute is not preempted by the Williams Act. It need not refer to the legislative history of the Act in reaching this result.

C. <u>The Legislative History of the Williams Act Does Not Support the Proposition that It Preempts State Laws which May Affect the Ease of Consummating Tender Offers.</u>

At a minimum, the test to be applied in determining whether the Indiana Statute is preempted by the Williams Act is "whether, under the circumstances of this particular case [the state's] law stands as an obstacle to the accomplishment and execution of the full purposes or objectives of Congress." <u>Hines v. Davidowitz</u>, 312 U.S. 52, 67-68 (1941).* In practice,

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* State statutes fall afoul of the Supremacy Clause under one of several "preemption" tests fashioned by this Court: 1) that Congress explicitly displaced state law (<u>e.g.</u>, <u>Shaw v. Delta Air Lines, Inc.</u>, 463 U.S. 85, 95-96 (1983)); 2) that Congress has so pervasively regulated a field that it is entirely occupied, precluding state regulation (<u>e.g.</u>, <u>Rice v. Santa Fe Elevator Corp.</u>, 331 U.S. 218, 230

this Court has rarely held state statutes to be preempted under the Hines test in the absence of an "actual conflict" between the state and federal statutes* or an "unambiguous congressional mandate" requiring

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(footnote continued)

(1947)); or 3) that the state law "actually conflicts" with federal law either because compliance with both is a "physical impossibility" (Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963)), or because it falls within the Hines test. See generally Fidelity Federal Savings & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 152-53 (1982). The only preemption test arguably relevant in this case is the Hines test.

* E.g., Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 706 (1984) (state law "compels conduct that federal law forbids"); Michigan Canners & Freezers Ass'n, Inc. v. Agricultural Board, 467 U.S. 461, 477-78 (1984) (state law "empowers producers' associations to do precisely what the federal Act forbids them to do").

preemption of the statute.*

Finding no actual conflict, the Seventh Circuit rested its preemption holding upon its conclusion that the Williams Act embodies some congressional purpose which the Statute thwarts. Despite obvious reservations "stilled" only by the "weight of precedent," the Seventh Circuit sided with the plurality in MITE in holding that Congress intended in enacting the Williams Act to "[strike] a balance between target management and tender offeror that the states may not upset." 794 F.2d at 261 (CTS App. A21) (emphasis added). In so doing the Seventh Circuit conceded that "[o]f course it is a big leap from saying that the Williams Act does not

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* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141-52 (1963).

itself exhibit much hostility to tender offers to saying that it implicitly forbids states to adopt more hostile regulations . . . ." _Id_. at 262 (CTS App. A22).

Indeed, as Judge Posner pointed out, the legislative history states that "[t]he bill avoids tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid." _Id_. (CTS App. A23) (emphasis added). No inference arises from this or other statements on the subject of neutrality in the Act's legislative history that Congress intended to preempt state laws which might make takeovers of domestic corporations more difficult. Certainly the references to neutrality fall far short of the "extraordinary showing of

contrary intentions", Garcia, 469 U.S. at 75, that would justify the Court in deviating from the plain language of Section 28 of the 1934 Act. Nor do they demonstrate the kind of "unambiguous congressional mandate" necessary to preempt the "historic police powers of the States." Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146-47 (1962).

This is particularly true in view of the fact that, as this Court recognized in Piper v. Chris-Craft Industries, Inc., 430 U.S. 1 (1977), the neutrality of the Williams Act is "but one characteristic of legislation directed toward a different purpose -- the protection of investors."* 430 U.S.

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* In support of this conclusion the Piper Court quoted testimony of

at 29. Considering that under the 1934 Act the states are free to enact legislation for the protection of investors which does not conflict with its provisions, it seems apparent that Congress had no purpose in mind other than observing a policy of neutrality in its own takeover legislation.

The Seventh Circuit's opinion itself amply demonstrates that the fundamental premise it relied upon in resolving the Supremacy Clause issue --

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(footnote continued)

> Manuel Cohen, then Chairman of the SEC, who stated that "the principal point is that we are not concerned with assisting or hurting either side. We are concerned with the investor who today is just a pawn in a form of industrial warfare. . . . The investor is lost somewhere in the shuffle. This is our concern and our only concern." 430 U.S. at 27-28 (emphasis in original).

that states may not upset the balance struck in the Williams Act -- is highly doubtful. And the "weight of precedent," which was evidently the factor which convinced the Seventh Circuit not to "reexamine" its own analysis of this issue in MITE Corp. v. Dixon, 633 F.2d 486 (7th Cir. 1980), rests on no firmer foundation.

Lower federal court rulings on the issue derive from this Court's plurality opinion in MITE, which was written by Justice White and joined in by Chief Justice Burger and Justice Blackmun. Justices Powell and Stevens refused to join the Supremacy Clause portion of Justice White's opinion, Justice Powell stating that:

> [T]he Williams Act's neutrality policy does not necessarily imply a congressional intent to prohibit state legislation designed to

> assure -- at least in some circumstances -- greater protection to interests that include but often are broader than those of incumbent management.

457 U.S. at 646-47. And in similar language, Justice Stevens wrote:

> I am not persuaded, however, that Congress' decision to follow a policy of neutrality in its own legislation is tantamount to a federal prohibition against state legislation designed to provide special protection for incumbent management.

Id. at 655. Justices O'Connor, Marshall, Brennan and Rehnquist did not reach the Supremacy Clause issue.

The full Court should reject the reasoning of the plurality in MITE and should find that any principle of neutrality reflected in the legislative history of the Williams Act does not preempt state laws simply because they may have the practical effect of favoring incumbent management or

takeover bidders in tender offer contests.

D. The Indiana Statute Relates to Corporate Governance Issues which Are Not Subject to Preemption by a Federal Statute Regulating Takeover Bids.

The Indiana Statute, dealing as it does with the voting rights of control shares, regulates the internal affairs of Indiana corporations. As this Court recognized in MITE, the internal affairs of a corporation are those matters which are "peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders . . . ." 457 U.S. at 645. Voting rights of shareholders -- what matters require a shareholder vote, who is entitled to vote and the percentage vote required -- are among the corporate governance

issues that fall most clearly within the scope of the internal affairs doctrine. See Restatement (Second) of Conflict of Laws § 302, Comment b, at 306-07 and § 304 (1971). Indeed, this Court has said as much in Rogers v. Guaranty Trust Co., 288 U.S. 123, 129-30 (1933), a case involving the issuance, allotment and sale of stock and thus "the proportionate ownership of stockholders and their rights *inter sese*:"

> When, by acquisition of his stock, plaintiff became a member of the corporation, he, like every other shareholder, impliedly agreed that in respect of its internal affairs the company was to be governed by the laws of the State in which it was organized. His rights, whatever the tribunal chosen for their vindication, are to be determined upon the ascertainment and proper application of [that State's] law.

See also First National City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 621 (1983).

The plurality in MITE stated that the "internal affairs" doctrine was of little use to Illinois in the context of that case. The tender offers regulated by the Illinois Act, the plurality said, "contemplate transfers of stock by stockholders to a third party and do not themselves implicate the internal affairs of the target company." 457 U.S. at 645. The internal affairs doctrine is, however, squarely applicable in this case because the statute in question does not regulate "transfers of stock," but the voting rights of control shares. As the court stated in APL Limited Partnership v. Van Dusen Air, Inc., 622 F. Supp. 1216 (D. Minn. 1985), vacated and appeal dismissed, Nos. 85-5285/5286-MN (8th Cir. Nov. 26, 1985), while the

acquisition of shares itself does not implicate the internal affairs of the target corporation, use of the power acquired as a result of the acquisition "once the shares have been acquired may well be a proper subject of state regulation . . . ." 622 F. Supp. at 1223-24 (emphasis in original).

In regulating the voting rights of control shares, the Indiana Statute is one of a family of other, more common corporate governance provisions in state business corporation laws which affect the relative ease of asserting influence or control over corporations once a substantial block of shares has been acquired. For example, states commonly require a majority or greater vote (up to two-thirds in some cases) of outstanding shares to approve corporate

changes such as mergers, sales of substantially all corporate assets or dissolution of the corporation. Because these types of changes are often used by acquirers to squeeze out minority shareholders, the need for shareholder approval has the effect of making takeovers more expensive (since a larger number of shares must be bought) and therefore less attractive. See Hochman & Folger, Deflecting Takeovers: Charter and By-law Techniques, 34 Bus. Law. 537, 547-48 (1979).

Provisions for the cumulative voting of shares are also common, and the court below recognized them as a valid form of state regulation of internal corporate affairs. Dynamics, 794 F.2d at 264 (CTS App. A27). As the Seventh Circuit acknowledged, however,

and as several commentators have pointed out, cumulative voting rights can constitute a significant deterrent to hostile tender offers. Id.; Hochman & Folger, supra, at 538-39. When coupled with a staggered or classified board of directors, cumulative voting can force the holder of a majority block of shares to wait more than two years before gaining control of the board, thus frustrating the purpose of many tender offers. Hochman & Folger, supra, at 539.

Many states also permit corporations to require a supermajority vote of shareholders (in some cases up to 80%) to approve mergers or similar transactions with major stockholders. Because of the added expense involved in obtaining a supermajority block of shares, such provisions can be a

powerful deterrent to would-be tender offerors who intend to effect a merger or to sell off the corporation's assets. See M. Lipton & E. Steinberger, Takeovers and Freezeouts § 6.03[2][b] (1986).

Another commonly used defensive technique is the fair price provision, whereby supermajority approval is required for mergers or similar transactions with a major shareholder unless that shareholder offers minority shareholders a certain minimum price for their shares. Similarly, mandatory redemption provisions give shareholders the right to demand a minimum price for their shares once a tender offeror has acquired a threshold percentage of shares. Hochman & Folger, supra, at 555-56. These types of provisions are

consistent with the business corporation laws of most states and are being adopted with increasing frequency by corporations seeking to discourage or delay takeovers. M. Lipton & E. Steinberger, supra, at § 6.03[2][c].

Even measures designed solely to prevent or discourage hostile takeovers, such as poison pill provisions, are generally permitted by state law. E.g., Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986). As the court below conceded (while acknowledging a personal bias against such provisions), these matters are nevertheless "committed to the authority of the states. . . ." Dynamics, 794 F.2d at 255-56 (CTS App. A10).

All state business corporation laws except Hawaii follow the lead of the Model Business Corporation Act on the subject of voting rights which provides in Section 7.21(a) that "unless the articles of incorporation provide otherwise, each outstanding share, regardless of class, is entitled to one vote on each matter voted on at a shareholders' meeting." Revised Model Bus. Corp. Act § 7.21(a) (1985) (emphasis added). *See*, *e.g.*, Ind. Code Ann. § 23-1-30-2(a). Courts have recognized that such statutes permit corporations to restrict the voting rights of shareholders so that, for example, no one shareholder can vote more than a prescribed percentage of the outstanding stock. In *Providence and Worcester Co. v. Baker*, 378 A.2d 121

(Del. 1977), the Delaware Supreme Court held that § 212(a) of the Delaware Corporation Code, Del. Code Ann. tit. 8, § 212(a) (1983), containing language similar to the Model Act, validated a corporation's charter provision limiting shareholders to one vote per share up to fifty shares and one vote per twenty shares owned in excess of that amount and eliminating voting rights for shares owned in excess of 25% of those outstanding. Responding to the argument that the charter provision was unenforceable because all shares of stock within the same class must have uniform voting rights under Del. Code Ann. tit. 8, § 151(a), the Court stated that:

> [t]he voting power of the stock in the hands of a large stockholder is not differentiated from all others in its class; it is the personal

> right of the stockholder to exercise that power that is altered by the size of his holding.

378 A.2d at 123. _See also Deskins v. Lawrence County Fair & Development Corp._, 321 S.W.2d 408 (Ky. 1959) (corporate charter provision restricting all stockholders to a maximum of four votes at shareholders' meetings held valid). Such statutes can be of significant help in structuring the voting rights of a corporation's shareholders so as to make takeovers impracticable.* _See_ Note, _Delaware Resurrects the Common Law: Affirmation of Contractual Voting Restrictions_

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* Like provisions of state business corporation laws permitting corporations to vary the one share-one vote formula of voting power, the Indiana Statute is voluntary. Indiana corporations

<u>Within a Class of Stock</u>, 4 Del. J. Corp. L. 154, 172 (1978).

Indiana's Business Corporation Law includes many of the above provisions such as cumulative voting, (Ind. Code Ann. § 23-1-30-9); provisions permitting the issuance of special classes of stock which can be used to give existing shareholders costly redemption rights in the event of a change of control (Ind. Code Ann. § 23-1-27-1); provisions giving

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(footnote continued)

have the right to elect to be exempt from the Statute by adopting a charter provision or by-law. Ind. Code Ann. § 23-1-42-5. While the Statute requires a corporate decision to decline coverage, it is nevertheless optional.

appraisal rights to dissenters in any merger (Ind. Code Ann. § 23-1-44-1 to -20); and provisions conditioning any merger, sale of substantially all of the assets or dissolution of the corporation upon a majority vote of the shareholders. Ind. Code Ann. §§ 23-1-40-3; 23-1-41-2 and 23-1-45-2. These provisions, and the others discussed above, can hardly be characterized as neutral in the battle between tender offeror and management; in fact, they are regarded as, and in some cases are intended to be used as, defensive tools against hostile takeovers. <u>See generally</u> M. Lipton & E. Steinberger, <u>supra</u>; Hochman & Folger, <u>supra</u>.

Under the reasoning of the Seventh Circuit, however, these and other similar state laws governing internal affairs will be subject to constitutional attack on the ground that they are not neutral in the battle between aggressor and target for corporate control. The effect of the opinion below is thus to federalize a significant portion of the law relating to internal corporate affairs in contravention of the policies this Court has followed in such cases as Cort v. Ash, 422 U.S. 66 (1975), where the Court stated in an analogous context that:

> Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of

> directors with respect to stockholders, state law will govern the internal affairs of the corporation.

422 U.S. at 84 (emphasis added).

See also Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 479 (1977) ("Absent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden.").

E. The Indiana Statute Does Not Violate Any Policy of Neutrality in Tender Offer Contests which May Be Imposed by the Williams Act upon the States.

The Indiana Statute reflects state policy that disinterested shareholders of Indiana corporations should have a voice in so fundamental a

corporate event as the assumption by an acquirer of voting control over a substantial block of the corporation's stock. By preventing the acquirer and the officers and inside directors from voting on the issue of whether the control shares will carry voting rights, the Statute places this decision where it belongs--in the hands of disinterested shareholders who can decide the issue based upon their own self-interest. The Statute's requirement of a shareholder vote to confer voting rights on control shares is fully consistent with any policy of neutrality which may underlie the Williams Act.

1. <u>The Indiana Statute Does Not, Even as a Practical Matter, Impose a Fifty Day Waiting Period Upon Consummation of an Acquisition of Control Shares</u>.

The Illinois Act imposed a twenty business day <u>precommencement</u> notification requirement on tender offerors. In finding that this provision of the state law upset the balance established by the Williams Act, the plurality in <u>MITE</u> stated that:

> [B]y providing the target company with additional time within which to take steps to combat the offer, the precommencement notification provisions furnish incumbent management with a powerful tool to combat tender offers, perhaps to the detriment of the stockholders <u>who will not have an offer before them during this period</u>.

<u>MITE</u>, 457 U.S. at 635 (emphasis added). Similarly, in holding that the Indiana Statute is preempted by the Williams Act, the Seventh Circuit speculated that as a practical matter the Indiana

Statute imposes a fifty day delay upon an acquirer wishing to consummate an acquisition of control shares -- a reference to the period within which the corporation must hold a shareholders' meeting to consider voting rights.* There is no basis whatsoever for this conclusion.

Significantly, nothing in the Statute prevents an acquirer from making

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* As Judge Posner put it, "[t]he effect of the Indiana statute is . . . to impose a 50 day delay on tender offers at the option of the target firm. . . . The offeror dare not accept the tendered shares till the stockholders' meeting is held, since if he loses the vote on voting rights he will end up with nonvoting shares and will not be able to control the corporation--the main purpose of most tender offers. So he must hold the offer open for 50 days, rather than the 28 days required (on average) by the SEC's regulations under the Williams Act." Dynamics, 794 F.2d at 261 (CTS App. A20).

an offer to purchase control shares that entitles him to accept tendered shares for payment as soon as permissible under the Williams Act.* As the offer can be made simultaneously with delivery of an acquiring person statement to the target corporation, nothing in the Indiana Statute delays commencement of the offer, an aspect of the Illinois Act the plurality in *MITE* found could be detrimental to stockholders. Shareholders to whom the offer is addressed may immediately tender their shares to the offeror's escrow agent, and the offeror may accept them for

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* The Williams Act contains a 20 business day (or approximately 28 calendar day) minimum waiting period during which an offer must be kept open.

payment after passage of the Williams Act's twenty business day waiting period.

Should the offeror wish protection against the obligation to pay for the shares taken up in the event of an adverse shareholder vote on the voting rights issue, he can provide in the tender offer materials that tendered shares will be accepted for payment <u>subject to the condition that the shares are accorded voting rights within a specified period of time</u>. It is not unusual for tender offer materials to provide for the acceptance of tendered shares for payment conditioned upon the happening of a subsequent event. The need to condition acceptance for payment usually arises in situations where the tender offer cannot be consummated in the absence of some required state or

federal regulatory approval. Indeed, so common is the practice of conditioning acceptance for payment that the SEC has provided guidance on the subject in its Interpretative Release Relating to Tender Offer Rules, Exchange Act Release No. 34-16623, 3 Fed. Sec. L. Rep. (CCH) ¶ 24,284 I, at 17,758 (March 5, 1980) ("Nothing in the rules prohibits offers under the terms of which the acceptance for payment is conditioned upon fulfillment of a condition requiring regulatory approval.") The Release makes clear that the same principle applies to other types of conditions as well.

The United States Court of Appeals for the Second Circuit recognized this procedure as appropriate under the Williams Act in MacFadden

Holdings, Inc. v. JB Acquisition Corp., 802 F.2d 62, 70 (2d Cir. 1986). There the tender offer materials provided that the offeror was entitled to accept tendered shares for payment subject to later obtaining approval from the Federal Communications Commission to consummate the purchase of the shares. After the offeror's conditional acceptance of the shares for payment, tendering shareholders lost their withdrawal rights, and the offeror was assured of its ability to purchase the stock subject only to obtaining the necessary regulatory approval. Under the Indiana Statute an offeror can follow precisely the same procedure, accepting tendered shares for payment on the first day acceptance is permitted under the Williams Act (and thereby

terminating shareholders' withdrawal rights), conditioned upon a favorable outcome of the shareholder election on voting rights.

Further support for Indiana's position in this regard is found in the SEC's defense of the Hart-Scott-Rodino Antitrust Improvements Act (the "HSR Act") which has the potential for delaying the consummation (but not the commencement) of tender offers. In its Brief as Amicus Curiae in MITE, the SEC stated:

> Unlike the Illinois statute--which delays indefinitely the commencement of a tender offer until the bidder has complied with the statute's pre-commencement filing and review provisions -- the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a, merely precludes a bidder from purchasing tendered shares until it has received clearance from the Federal Trade Commission and the Department of Justice, both of which must act within a carefully limited time

> frame. 15 U.S.C. § 18a(a). It does not delay the commencement of the offer or the tendering of shares to the bidder's escrow agent. Moreover, the Hart-Scott-Rodino Act does not require, as does the Illinois statute, that the bidder make a public announcement of the material terms of its offer in the pre-commencement period.

Brief of Securities and Exchange Commission as Amicus Curiae at 19, Edgar v. MITE, 457 U.S. 624 (1982) (No. 80-1188) (emphasis added). Thus, the SEC has defended the compatibility of the HSR Act with the Williams Act despite the fact that it can impose substantial delays upon the consummation of a tender offer following its commencement.*

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* Under the regulations promulgated pursuant to the HSR Act of 1976, 15 U.S.C. § 18a (1982), tender offerors subject to the Act must file a Notification and Report Form with the Federal Trade Commission upon commencement of the offer. The

As a matter of procedure, a tender offeror could commence a tender offer and file the acquiring person statement required by the Statute with the target corporation the same day. The target corporation would be required

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(footnote continued)

offer is then subject to a thirty day waiting period (or, in the case of a purely cash tender offer, fifteen days) within which the Commission evaluates the tender offeror's submission. 16 C.F.R. § 803.10 (1986). Before the lapse of this thirty days, the Commission may request additional information or documentary material from the tender offeror. 16 C.F.R. § 803.20(a). Until the tender offeror has submitted the documentation required by the second request, the waiting period is tolled, further delaying the offer. Once the new information is filed, the Commission has a further period of twenty days (or, in the case of a purely cash tender offer, ten days) to pass on the offer or to seek judicial intervention to prevent its consummation. 16 C.F.R. § 803.20(c).

to call a shareholders' meeting to be held within fifty days and to set a record date for shareholders entitled to vote at the meeting.* Only shareholders of record are entitled to vote at shareholder meetings of Indiana corporations, and thus those who tendered their shares after the record date in response to the offer would be entitled to vote on the issue of whether to confer voting rights on the control shares sought. See Ind. Code Ann. § 23-1-29-7. Immediately after the minimum waiting period which the SEC has prescribed under the Williams Act, and before the shareholders' meeting, the offeror could conditionally accept all shares tendered for payment as discussed

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* See Ind. Code Ann. §§ 23-1-29-5(d) and 7.

above. Tendering shareholders would thereupon lose their withdrawal rights, and the offeror would have the shares locked up. However, the offeror would not be required to pay for the shares unless they received voting rights as specified in the tender offer materials.

Given a properly structured offer, the Indiana Statute does not give the target company "additional time within which to take steps to combat the offer," MITE, 457 U.S. at 635, an evil the plurality in MITE identified in the Illinois Act. Nor does the Statute require the offeror to assume any risk in the event of an adverse shareholder vote. Thus, the Seventh Circuit's conclusion that the Statute "impose[s] a 50 day delay on tender offers" fails to

consider the practical alternatives open to the offeror.

Tender offerors and their professional advisers are undoubtedly in possession of sufficient experience and expertise to predict the price and terms required in given circumstances to prompt a majority of disinterested shareholders to tender their shares. It seems self-evident that if the majority of the shareholders wishes to sell its shares at the price offered, it will vote to confer voting rights on the control shares sought. Thus, there is no basis for Judge Posner's speculation that the "tenderer mercies of the 'disinterested' shareholders" may operate to frustrate tender offers.*

* This phrase is a reference to the fact that, according to Judge

2. The Indiana Statute Is Consistent with the Policy Embodied in the Williams Act.

In any event, this criticism of the Statute is wide of the mark. The one certain purpose of the Williams Act is to protect shareholders.* A statute which gives shareholders the opportunity to vote as a group on the issue of the change of control represented by a control share acquisition gives shareholders important new rights as

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(footnote continued)

Posner, the Illinois Act put the tender offeror at the "mercy of the Illinois Secretary of State" and seems to embody his belief that the disinterested shareholders would be more receptive than the Secretary to tender offers. Dynamics, 794 F.2d at 263 (CTS App. A23).

* See supra, discussion at 42-43.

against both aggressor and incumbent management.

Seen in its proper light, the Indiana Statute is consistent with the policy, which the plurality of this Court discerned in the Williams Act, of letting shareholders make their "own informed choice." MITE, 457 U.S. at 634. Whether offerors elect to purchase control shares before or after a vote by the disinterested shareholders on the voting rights issue, the majority of these shareholders themselves will decide the issue of whether the offer is attractive.

That the Indiana Statute in fact maintains the balance among offerors, shareholders and incumbent management in battles for corporate control is demonstrated by the fact that

for the first time a state has given offerors the absolute right to obtain an immediate shareholder vote on the merits of their offers. Incumbent management is required to hold the election but cannot vote its own shares. The effect of this is likely to be that incumbent management will be less able to wage war against an offer the majority of shareholders wishes to accept. Once the disinterested shareholders have voted in favor of an offer, management should be dissuaded from continuing to fight. It certainly would not be able to justify its continuing opposition, as many have in the past, on the ground that a tender offer is inherently coercive and that shareholders are left with no real choice but to tender their shares. Under the Indiana Statute the will of

the majority expressed at a shareholder meeting will constitute an irrefutable demonstration of the shareholders' wishes.

Because the Indiana Statute does not have the effect of delaying tender offers and because the requirement of a shareholder vote on the issue of the voting rights of control shares cannot be said to favor either incumbent management or offeror, the Indiana Statute does not upset any balance struck between them in the Williams Act.

## II. THE INDIANA STATUTE DOES NOT VIOLATE THE COMMERCE CLAUSE.

The second question on appeal to this Court is whether the Indiana Statute violates the Commerce Clause. Significantly, the Statute does not regulate commerce, but only the voting

rights to be accorded to control shares acquired in Indiana corporations.

A. Indiana May Determine the Voting Rights of Shareholders of Its Domestic Corporations Free of Constitutional Restraint.

Nothing in the Commerce Clause requires Indiana to resolve voting rights or other corporate governance issues in any particular way so long as the State does not discriminate against interstate commerce. Nor is the Indiana Statute subject to attack based upon a court's assessment of its "economic wisdom" or "ultimate economic efficacy." Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124-25 (1977).

As developed more fully in the brief of Appellant CTS Corporation, because Indiana has the right to determine the property right characteristics of the shares of its

corporations which are for sale in interstate commerce, the Indiana Statute is not subject to attack on Commerce Clause grounds. The "market for corporate control" which Judge Posner identified in his opinion is one whose very existence depends upon the state laws defining shareholders' property rights and ownership interests. See Louisville & Nashville Ry. Co. v. Kentucky, 161 U.S. 677, 702-03 (1896); Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819).

B. In Any Event, the Indiana Statute Is Constitutional under the Test Enunciated in Pike v. Bruce Church, Inc.

If relevant at all, the test to be applied in ruling on the "dormant" Commerce Clause issue presented is that

set out in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Application of this balancing test demonstrates that the Indiana Statute was a proper exercise of the State's authority to pass laws relating to the internal affairs of its domestic corporations.

1. The Indiana Statute Does Not Discriminate Against Interstate Commerce.

Because the provisions of the Statute apply whether the control shares are acquired by a resident or a non-resident and whether in intrastate or interstate commerce, the Indiana

Stat e "regulates evenhandedly," and does not have even the incidental effect of discriminating against interstate commerce. Id. And, as this Court indicated in Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 675 (1981) (plurality opinion), state laws which do not discriminate against interstate commerce are entitled to "special deference."*

2. The Indiana Statute Effectuates a Legitimate State Interest, and Its Benefits Outweigh Any Incidental Burden on Interstate Commerce.

The Indiana Statute is unquestionably addressed to the corporate governance, and hence to the internal

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* See also Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 125-26 (1978); Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 448 (1960).

affairs, of Indiana corporations. This Court stated in _Kassel_ that:

> The extent of permissible state regulation is not always easy to measure. It may be said with confidence, however, that _a State's power to regulate commerce is never greater than in matters traditionally of local concern_.

450 U.S. at 670, (emphasis added). Like laws and regulations adopted under a state's police power addressed to health and safety concerns, laws governing the internal affairs of a state's domestic corporations are clearly addressed to "matters traditionally of local concern" within the meaning of _Kassel_. _See_, _e.g._, _Cort v. Ash_, 422 U.S. 66 (1975).

As the plurality recognized in _MITE_, under the internal affairs doctrine the rights _inter sese_ of shareholders in Indiana corporations are

determined exclusively by Indiana law:

> The internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs -- matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders -- because otherwise a corporation could be faced with conflicting demands.

457 U.S. at 645. For this reason, no other state has the right or the power to protect shareholders of Indiana corporations through the medium of laws relating to corporate governance.*

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* Prompted by the obvious need for uniform resolution of internal affairs questions affecting such matters as voting rights of shareholders, validity of stock issuances, relative rights of shareholders, election of directors, ability to effect mergers and other organic changes and the duties of officers, directors and controlling shareholders to the corporation and its shareholders, courts almost invariably decide these questions by

Moreover, as a corollary to the internal affairs doctrine, in purchasing stock of an Indiana corporation, the acquirer "impliedly agree[s] that in respect of its internal affairs the company [is] to be governed by the laws of [that] state." Rogers v. Guaranty Trust Co., 288 U.S. 123, 129 (1933).

Indiana cannot, as a practical matter, enact corporate governance provisions which apply only to Indiana residents. Without simultaneously protecting nonresident shareholders, the State would in many instances be unable to protect resident shareholders. Such

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(footnote continued)

applying the incorporating state's law, regardless of where the operative facts occurred. See, e.g., Restatement (Second) of Conflict of Laws § 302, Comment b, at 306-07 and § 304 (1971).

is the case with the Indiana Statute because voting rights cannot, by their nature, vary depending upon the address of the shareholder.

Where the internal affairs of its domestic corporations are concerned, Indiana thus has a legitimate interest in protecting both resident and nonresident shareholders. Indeed, if Indiana does not protect nonresident shareholders in corporate governance matters, no other state is in a position to do so. Indiana, in effect, receives consideration from other states for protecting shareholders of Indiana corporations residing within their borders. Other states, through their own business corporation laws, protect Indiana residents who are investors in their domestic corporations.

It follows inexorably that Indiana has a legitimate interest in protecting all shareholders of its domestic corporations in matters relating to corporate governance and not just those residing in Indiana. Thus, in performing the "local benefits" analysis of Pike v. Bruce Church, the inquiry must be whether Indiana had a legitimate interest in enacting the Indiana Statute for the benefit of all shareholders of covered Indiana corporations and whether its putative benefits justify any incidental burden imposed on interstate commerce.*

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* The Statute is not applicable to the voting rights of control shares unless at least 10% of the shares of the corporation are held by Indiana residents, 10% of the shareholders are Indiana residents or 10,000 shareholders reside in Indiana. Quite apart from the substantial

The internal affairs doctrine is, of course, much more than a principle of conflict of laws. The federal government has never adopted a national corporation code, but has left the development of business corporation laws to the states. This Court has respected the autonomy of the states in regulating all aspects of corporate organization and government, which are matters traditionally of local concern. Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 479 (1977). Maintenance of the proper relationship between the

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(footnote continued)

benefits to nonresidents, these threshold percentages ensure that the Statute confers local benefits sufficient to survive any Commerce Clause challenge in view of the minimal effect it should have on interstate commerce.

federal and state governments requires that great deference be given to the decisions reached by state legislatures regarding regulation of their domestic corporations.

The Indiana Statute protects shareholders of Indiana corporations by permitting the majority of the disinterested shareholders to determine whether a material change in voting control of the corporation is in its best interests. In regulating this aspect of corporate governance, the Statute is but an extension of other provisions of the Indiana Business Corporation Law which require shareholder approval of fundamental changes in the corporation, such as a merger with another corporation (Ind. Code Ann. § 23-1-40-3); a sale of

substantially all of its assets (Ind. Code Ann. § 23-1-41-2); or a dissolution of the corporation (Ind. Code Ann. § 23-1-45-2).

The Indiana Statute permits shareholders to evaluate the intentions of an offeror seeking a controlling block of shares to determine whether he will use his voting power in the best interests of the minority shareholders. Whether a shareholder's interests are served by accepting an offer which may result in the purchase of less than all of his shares depends upon how the new controlling shareholder will run the business and whether he will abuse his ability to control the corporation.

Indiana also has a strong interest in the welfare of employees of Indiana corporations with headquarters,

factories or other operations in the State. The Statute permits shareholders (who may also be community residents or employees or suppliers of the corporation) to determine the intentions of any offeror concerning the liquidation of the company or its possible removal from the State. Shareholders may also want to consider the serious adverse effects hostile takeovers can have on employee morale. Coffee, Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer's Role in Corporate Governance, 84 Colum. L. Rev. 1145, 1241-42 (1984).

If so inclined, the shareholder may vote against conferring voting rights on the control shares in an effort to prevent drastic changes in the

conduct of the business which would adversely affect the company or the community. <u>See</u>, <u>e.g.</u>, <u>Cardiff Acquisitions, Inc. v. Hatch</u>, 751 F.2d 906, 912 (8th Cir. 1985) (recognizing that a requirement of Minnesota law that a tender offeror provide information as to the "impacts on the state or its residents of the takeover" was a local benefit because shareholders may wish to take these matters into consideration in deciding whether to tender their shares).

In the case of tender offers, the practical effect of the Statute should be to permit shareholders to evaluate their merits without coercion. Tender offers are frequently structured as partial or two-tier offers with cash for an initial percentage of the corporation's shares and a later

component of consideration of questionable value for the remaining shares (such as high risk corporate bonds). Two-Tier Tender Offer Pricing and Non-Tender Offer Purchase Programs -- Advance Notice of Possible Commission Action, Exchange Act Release No. 21079, [1984 Transfer Binder] Fed. Sec. L. Rep. ¶ 83,637 (June 21, 1984) at 86,915 n.1.

In many partial or two-tier offers, the initial premium offered to shareholders is substantial, but the second-tier price is considerably lower, resulting in an overall premium that is unfavorable to shareholders. Although it may be in the best interests of all shareholders to collectively reject such an offer, individual shareholders are likely to reason that it is in their own best interest to tender their shares.

As isolated individuals, they cannot control the outcome of the offer; if the offer is successful, those who have tendered their shares will receive the higher premium on at least a pro rata basis. Those who have not tendered, on the other hand, will be left with shares of a much lower value.* Bradley,

* The SEC has likened this phenomenon to the "prisoner's dilemma," where two suspects are separately interrogated by the police. Each suspect is told that if he confesses and the other does not, he will be released and his partner will receive the maximum sentence. If the other suspect confesses and he does not, however, he will receive the maximum sentence and the other prisoner will go free. If both confess, each will receive a lenient sentence. Although both suspects could remain free by refusing to confess, their individual self-interest and inability to control the other party's actions will lead them to confess. Two-Tier Tender Offer Pricing and Non-Tender Offer Purchase Programs -- Advance Notice of Possible Commission

<u>Interfirm Tender Offers and the Market for Corporate Control</u>, 53 J. Bus. 345, 356 (1980). Statistics support the conclusion that two-tier offers are inherently coercive, since shareholders receive substantially lower premiums in successful two-tier offers than in "any or all" offers. Two-Tier Tender Offer Pricing and Non-Tender Offer Purchase Programs -- Advance Notice of Possible Commission Action, Sec. Exchange Act Release No. 21079, [1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,637 (June 21, 1984). The Indiana Statute permits shareholders confronted with a partial or two-tier offer to collectively

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(footnote continued)

Action, Exchange Act Release No. 21079, [1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83, 637 (June 21, 1984).

evaluate the merits of the whole offer without being stampeded into accepting an undesirable first step offer out of fear of losing an attractive initial premium that other shareholders will receive if the offer is successful.

In those cases where the offeror elects to proceed by means of a conditional tender offer, the Indiana Statute will have a practical effect analagous to that of legislation in the United Kingdom which requires majority shareholder approval of tender offers. The British regulations allow shareholders to simultaneously tender their shares and vote for or against the offer. If a majority votes against the offer, tendered shares are returned to the shareholders and the tender offer cannot go forward:

> Under the City Code, a letter of transmittal by which target company shareholders respond to an offer must provide an opportunity to approve or disapprove an offer for less than all of the outstanding shares. The tender offer reply form thus permits the shareholder to exercise two choices in response to the bid. First, the shareholder may tender or not tender shares that are the subject of the offer. Second, the shareholder is permitted to vote for or against the offer. If a majority of the shareholders vote against the offer, the shares will be returned and the bid will not be permitted to proceed. Thus, in the case of a partial offer, including an explicit two-tier priced offer, a shareholder may tender shares and vote against the transaction at the same time.

Id. at 86,919 (footnote omitted).

As the SEC has noted, "[t]his type of provision appears to eliminate effectively the perceived coercive aspects of the two-tier bid that have evoked concern. A shareholder who is not satisfied with the price of the offer, but who feels compelled to tender

shares into the first step tender offer, may at the same time protect his or her position by voting against the offer." Id. at 86,919.

For the foregoing reasons, the Indiana Statute confers substantial benefits on shareholders of Indiana corporations. These benefits are entitled to great weight in applying the balancing test of Pike v. Bruce Church.

3. The Burden, if any, of the Indiana Statute upon Interstate Commerce Is Minimal.

It is obvious from the provisions of the Indiana Statute that it does not prohibit or regulate interstate commerce in shares of Indiana corporations. The Statute does not affect the voting rights of shares other than control shares. Moreover, anyone purchasing control shares for investment

may buy the shares and file an acquiring person statement without requesting a shareholders' meeting to determine his voting rights. While such an investor would be unable to vote the control shares acquired, he would be entitled to the full economic benefits of the shares and would be free to sell them to third parties. In the hands of a subsequent purchaser, the shares would carry voting rights unless that purchase was itself a control share acquisition.

a. <u>The Statute Does Not Impede Commerce in Corporate Control.</u>

The Seventh Circuit premised its Commerce Clause ruling upon a belief that the Statute impedes "commerce in corporate control." 794 F.2d at 264 (CTS App. A26). We have demonstrated above, however, that the Indiana Statute does not delay the commencement or

consummation of tender offers or prevent an offeror from acquiring control shares on the same timetable and using essentially the same procedures that have become common in contests for corporate control.* The only difference is that instead of being able to obtain voting rights with respect to control shares automatically upon consummation of the tender offer, the tender offeror must await the result of an expedited shareholders' meeting in which those disinterested shareholders to whom the offer is being made will decide that issue by majority vote.

There is no evidence in the record, nor any reason for concluding, that the necessity for such a

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* See <u>supra</u>, discussion at 62-73.

shareholder vote will deter tender offers for control shares of Indiana corporations, reduce the prices offered for shares in such transactions or otherwise burden or inhibit interstate commerce in such shares. There is, in fact, considerable support for the opposite conclusion, as legislation regulating tender offers has historically had a marginal effect on the volume and outcome of tender offers. _See_ M. Lipton & E. Steinberger, _Takeovers and Freezeouts_ § 1.01 [3] n.4 (1986); Jarrell & Bradley, _The Economic Effects of Federal and State Regulation of Cash Tender Offers_, 23 J.L. & Econ. 371, 401 (1980). State regulation has not deprived shareholders of the opportunity to obtain premiums for their shares in tender offers, but rather has generally

led to a substantial increase in the premiums offered. Jarrell & Bradley, _supra_, at 390. The Indiana Statute, if allowed to stand, may have a similar effect as tender offerors would be required to price the offer attractively enough to obtain the necessary majority shareholder vote.

This Court, in reviewing the Seventh Circuit's decision, is free to form its own conclusions concerning the "practical impact" of the Indiana Statute upon interstate commerce. _See Hughes v. Oklahoma_, 441 U.S. 322, 336 (1979). In making its review, the Court should consider, as discussed above, that the Indiana Statute may well have the effect of truncating many tender offer battles between aggressor and incumbent management -- a result which

would enhance interstate commerce in control shares. The Court may take judicial notice of the fact that bitterly fought takeover battles often last many months. Under the Indiana Statute the aggressor is in the unique position of being able to force a shareholders' meeting and thereby take the issue directly to the shareholders on an expedited basis. In the face of a favorable vote of the shareholders on an offer or proposed offer, management should be reluctant to continue the battle.

In fact, if the Statute is allowed to stand offerors may wish to adopt the strategy of filing an acquiring person statement containing the proposed offer and refraining from incurring the expense of the tender

offer itself (with its accompanying litigation), until after the disinterested shareholders have spoken. After the election, the offer, which might otherwise have taken months and consumed millions of dollars in legal and other professional fees, may be able to proceed without management opposition.

As the foregoing demonstrates, the provisions of the Indiana Statute should not hinder, and in many cases may actually facilitate, the purchase of control shares pursuant to offers which are attractive to the majority of a corporation's shareholders. Tender offerors and others interested in acquiring control shares for the purpose of controlling or influencing a corporation are capable of taking advantage of the benefits of the Indiana

Statute and of eliminating any delay in consummating an offer -- all without incurring the risk of buying non-voting stock.

For these reasons it was error on the part of the court below to hold the Statute unconstitutional on Commerce Clause grounds. The court's principal reason for reaching the conclusion that the Statute would hinder tender offers was its belief, which we have shown to be wrong, that it imposes a fifty day delay on consummation of such offers. The requirement of an election of the disinterested shareholders cannot, by itself, support a finding that commerce is burdened by the Statute. As a practical matter, if a majority of the disinterested shareholders considers the tender offer attractive, the offeror

will receive the requisite shareholder vote to confer voting rights on the control shares. If a majority does not consider the offer attractive, it deserves to fail. Accordingly, any incidental effect the Indiana Statute may have on interstate commerce in control shares is minimal.

b. The Indiana Statute Does Not Overlap with Other State Laws and Will Therefore Not Stifle Acquisitions of Control Shares.

The Indiana Statute is far more discriminating in its application than the Illinois Act struck down in MITE. The Statute applies only to corporations organized under the laws of Indiana with 100 or more shareholders and which have their principal places of business, principal offices or substantial assets within Indiana. In addition, subject corporations must have more than ten

percent of their shareholders resident in Indiana, more than ten percent of their shares owned by Indiana residents or more than 10,000 shareholders resident in Indiana. Ind. Code Ann. § 23-1-42-4(a).

This Court in Brown-Forman Distillers Corp. v. N.Y. Liquor Authority, 476 U.S. ___, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986), stated that the MITE Court's Commerce Clause objections to the Illinois Act were premised on "the likelihood that a seller will be subjected to inconsistent obligations in different states." 476 U.S. at ___, 90 L. Ed. 2d at 562-63. Professor Levmore has summarized the MITE decision similarly:

> [T]he Court emphasized this concern with potentially overlapping state schemes by distinguishing a state's regulation of the 'internal affairs

> of a corporation incorporated under its laws' from the Illinois statute. The Court argued that the former generates no overlap and ensures that a corporation will not face conflicting state demands. . . . Some [state statutes] generate very little 'direct' interference with interstate commerce because no more than one state can claim jurisdiction. . . . If a state's takeover statute applies only when target companies are incorporated in the state _and_ have their principal place of business in-state, then, at most, only one state's statute would apply to any one company.

Levmore, _Interstate Exploitation and Judicial Intervention_, 69 Va. L. Rev. 563, 621 and n.235 (1984) (emphasis in original).

The Indiana Statute is responsive to these concerns expressed in _MITE_. It does not purport to regulate foreign corporations doing business in Indiana, and under the internal affairs doctrine there is no risk of overlap with the laws of other

states which might require offerors to comply with conflicting laws in proceeding with a tender offer. Thus, the Statute does not have the "sweeping extraterritorial effect" which led the plurality in MITE to conclude that if the Illinois Act were upheld, interstate commerce in securities transactions generated by tender offers would be "thoroughly stifled." 457 U.S. at 642.

## CONCLUSION

The Indiana Statute is a measured and proportionate corporate governance statute which has been narrowly drawn to further the State's legitimate interest in protecting shareholders of its domestic corporations. As it does not conflict with the provisions or policy of the Williams Act and does not place any

significant burden on interstate commerce, this Court should reverse the judgment of the court below.

December 4, 1986.

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## QUESTION PRESENTED

Whether the Control Share Chapter of the Indiana Business Corporation Law (the "Chapter") is unconstitutional where:

1. The Chapter (a) has a protectionist purpose, (b) directly regulates interstate commerce between nonresident parties, (c) has discriminatory effects on interstate commerce and (d) burdens interstate commerce in a manner that far outweighs any local benefits; and

2. The Chapter conflicts with (a) the Williams Act's market method of investor protection by subjecting a shareholder's decision to sell its shares to the prior approval of management and at least two shareholder groups and (b) the policy of neutrality between management and tender offerors upon which the investor protections of the Williams Act rest.

## PARTIES TO PROCEEDINGS BELOW

Seventh Circuit No. 86-1601 involved the constitutional questions presented by this appeal. The parties were: Dynamics Corporation of America ("DCA"), as plaintiff-appellee; CTS Corporation ("CTS"), Robert D. Hostetler, Gary B. Erekson, and Joseph DiGirolamo (officers and/or directors of CTS), as defendants-appellants; and the State of Indiana ("Indiana"), as intervenor-appellant.

Seventh Circuit No. 86-1608 involved the same action in the District Court, was consolidated with No. 86-1601, but did not involve the constitutional questions presented by the present appeal. The parties were: DCA, Andrew Lozyniak, Edward J. Mooney, Henry V. Kensing, Patrick J. Dorme, Frank A. Gunter, Curtis T. Roff, Saul Sperber, Joseph P. Walker and Harold Cohan (officers and/or directors of DCA) as plaintiffs-appellees; and CTS, Robert D. Hostetler, Gary B. Erekson, Joseph DiGirolamo, George F. Sommer, Gerald H. Frieling, Jr., Don J. Kacek, Ted Ross and Richard M. Ringoen (officers and/or directors of CTS) as defendants-appellants.

*Rule 28.1 Listing.* Appellee DCA has no parent corporation, non-wholly owned subsidiaries, or affiliates.

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## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the following constitutional provisions and statutes:

1. Supremacy Clause, U.S. Const. art. VI, cl. 2.
2. Commerce Clause, U.S. Const. art. I, § 8, cl. 3.
3. Williams Act Amendments to the Securities Exchange Act of 1934, 15 U.S.C. §§ 78l(i) 78m(d)-(e) 78n(d)-(f) (1982 & Supp. III 1985).
4. Control Share Acquisitions Chapter of the Indiana Business Corporation Law, Ind. Code §§ 23-1-42-1 to 11 (1986).

## COUNTER-STATEMENT OF THE CASE

In their statements of the case, appellants[1] argue that the Chapter is merely a voting provision which does not "restrict," "govern" or "regulate" interstate tender offers or the interstate purchase and sale of securities. (CTS Br. at 3-4, Ind. Br. at 10-11.) Such assertions, however, ignore the Chapter's provisions and the facts of this case.

### A. The Chapter Regulates Interstate Tender Offers And Securities Transactions

The Chapter is part of the revised Indiana Business Corporation Law ("Business Corporation Law"), IND. CODE §§ 23-1-17-1 to 23-1-54-2 (1986).[2] It removes existing shareholder voting rights from so-called "control shares." IND. CODE § 23-1-42-1. The Chapter defines "control shares" as the block of shares of an Indiana corporation that when purchased will put an "acquiring person" over certain share ownership thresholds: 20%, 33.3% and 51%. IND. CODE § 23-1-42-1. It applies to a variety of "control share acquisitions," including interstate tender offers which cross any of the ownership thresholds. IND. CODE § 23-1-42-1. The Chapter governs tender offers even if 90% of the corporation's shareholders, its principal place of business, its principal office and the tender offeror are located outside Indiana. IND. CODE § 23-1-42-4.

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[1] DCA respectfully requests the Court's indulgence when it refers to "appellants" rather than the more unwieldy formulation "CTS and Indiana." *See* Fed. R. App. P. 28(d). Their arguments are substantially the same.

[2] The Chapter does not contain a statement of purpose and no official legislative history of the Business Corporation Law has been published. Section 23-1-17-5 of the Business Corporation Law permits a General Corporation Law Study Commission to publish official comments on the Chapter. No such comments have been published as of January, 1987. If later published, such comments should be given little weight by this Court because they will have been drafted after DCA challenged the Chapter.

The Chapter applies to all Indiana corporations that are "issuing public corporations."[3] IND. CODE § 23-1-42-5. At the same time it establishes procedures by which incumbent management may decide whether and when to invoke its provisions. The Chapter empowers incumbent management to opt out of (or back into) the Chapter without shareholder approval. IND. CODE § 23-1-42-5. *See also* IND. CODE § 23-1-22-4(c)(3) (permitting Indiana corporations to adopt defensive measures against changes in corporate control without shareholder approval). It imposes no limits on managerial discretion.

Once it is triggered, the Chapter removes the voting rights from all shares tendered. The statute applies regardless of the nature of the tender offer or the intentions of the tender offeror. It applies regardless of the performance of incumbent management or the potential benefits of the acquisition to shareholders, the corporation or Indiana citizens. The tender offeror can only recover its voting rights pursuant to a statutory procedure administered by management and "only to the extent granted by resolution approved by the shareholders . . . ." IND. CODE § 23-1-42-9(a).[4] At a minimum, a majority of (1) all shareholders *and* (2) all shareholders "excluding all interested shares" must

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[3] The Chapter as part of the Business Corporation Law becomes generally applicable on August 1, 1987. IND. CODE § 23-1-17-3(b). Indiana corporations were permitted to opt into the Business Corporation Law after April 1, 1986. IND. CODE § 23-1-17-3(b)(1)-(2). CTS was the first Indiana corporation to adopt the Business Corporation Law. (R. 55, Exh. A.)

[4] Thus, the Chapter allows management to propose that the acquiring person be granted restricted voting rights. Such restricted voting rights might, for example, prohibit the acquiring person from participating in the selection of the company's board of directors. *See* IND. CODE § 23-1-42-9(b)(2). Gaining limited voting rights would be a Pyrrhic victory for the acquiring person because the Chapter permits management to redeem shares not given full voting rights. IND. CODE § 23-1-42-10(b).

approve a resolution reenfranchising the "control shares" with some or all of the voting rights. IND. CODE § 23-1-42-9(b).[5] Shareholders are disqualified from voting on the voting rights resolution as "disinterested" persons if the tender offeror votes their proxies. IND. CODE § 23-1-42-3(1).

The tender offeror can request a special shareholders meeting on the voting rights issue. IND. CODE § 23-1-42-7(a). The request is not a vehicle for "prompt" shareholder resolution of that issue. (CTS Br. at 4.) Although federal law permits tender offerors to purchase tendered shares 20 business days (*circa* 28 calendar days) after making a tender offer, 17 C.F.R. § 240.14e-1a (1986), the Chapter allows management to delay the meeting for 50 days, IND. CODE § 23-1-42-7(b). In practice, resolution of the voting rights issue will take longer than 50 days, considering the time it will take to count the shareholder ballots and to conclude any litigation arising out of the special shareholders meeting, proxy solicitations and ballot counting process.[6] If this delay is only 10 days beyond the 50 day period, the tendering shareholders will regain their withdrawal rights under the Williams Act,

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[5] In control share transactions that implicate § 23-1-38-4(a) of the Indiana Business Corporation Law by, for example, causing the issuance of a new class of stock, more than two voting groups must approve the voting rights resolution. *See* IND. CODE § 23-1-42-9(b)(1). Appellants' self-serving interpretation of § 23-1-42-9(b) is contrary to its plain language and the interpretations of the District Court, CTS App. 38-39, the Seventh Circuit, CTS App. at 20, and other courts that have considered similar voting requirements. *See, e.g., Fleet Aerospace Corp. v. Holderman*, 637 F. Supp. 742, 750-53 (S. D. Ohio), *aff'd*, 796 F.2d 135 (6th Cir.) *appeal docketed*, No. 86-344 (U.S. Sept. 2, 1986); *Icahn v. Blunt*, 612 F. Supp. 1400, 1406-1407 (W.D. Mo. 1985).

[6] There is an inevitable delay in counting the votes after a shareholders meeting. For example, in this case it took 14 days

*(Footnote continued on the following page)*

15 U.S.C. § 78n(d)(5). The exercise of these withdrawal rights willterminate a tender offer.[7]

To obtain a special shareholders meeting, the tender offeror must file an "acquiring person statement" and give an undertaking to pay the corporation's expenses of holding a special shareholders meeting. IND. CODE § 23-1-42-7(a).[8] The information to be supplied in the acquiring person statement is duplicative of that which tender offerors must supply to the corporation and its shareholders under the Williams Act, 15 U.S.C. § 78m(d)(1). The Chapter does not require the tender offeror to disclose any additional information which may help shareholders resolve the voting rights issue. IND. CODE § 23-1-42-8(b).

The Chapter allows management to redeem any purchased shares not accorded full voting rights "at the fair value thereof pursuant to the procedures adopted by the corporation." IND. CODE § 23-1-42-10(a)-(b). The Chapter does not define "fair value" for purposes of the corporation's redemption of the tender offeror's shares. It may, however, require tender offerors to pay dissenting shareholders for their shares at a "fair value" above market price.

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6 *(Continued)*

to tally the votes cast at the 1986 CTS Annual Meeting. *See Dynamics Corp. of America v. CTS Corp.*, 643 F. Supp. 215, 216-217 (N.D. Ill. 1986). DCA challenged the election results. It took the District Court approximately three weeks to rule on DCA's request for a preliminary injunction in connection with its challenge.

[7] If, upon the expiration of the 60 day period, the tender offeror makes a revised offer, then management could require the tender offeror to file a revised acquiring person statement, and the 50 day period for a shareholder vote would begin running anew.

[8] It is unclear under the Chapter whether the acquiring person is responsible for the corporation's litigation expenses arising out of the special shareholders meeting, which expenses could be substantial.

IND. CODE § 23-1-42-11(b)-(c). The Chapter also regulates those tender offerors who do not file an acquiring person statement. It permits management to delay a vote on a voting rights resolution until the next annual meeting. IND. CODE § 23-1-42-7(c).[9] The Chapter also empowers management to redeem the shares tendered to the non-filing tender offeror 60 days after announcing the tender offer. IND. CODE § 23-1-42-10(a).

### B. This Case Illustrates The Chapter's Regulatory Impact On Interstate Tender Offers

CTS is an Indiana corporation and DCA is a New York corporation headquartered in Connecticut. (CTS App. at 5.) Both companies are publicly owned and their stock is traded on the New York Stock Exchange. (Id.) Approximately two-thirds of CTS shareholders reside outside of Indiana. (DCA App. at 59.) On March 10, 1986, DCA, then CTS' largest shareholder, commenced a tender offer for 1,000,000 additional shares of CTS stock at $43 per share (CTS App. at 1, 5), a premium of more than 20% above market price. *Dynamics Corp. of America v. CTS Corp.*, 794 F.2d 250, 253 (7th Cir.), *appeal docketed* Nos. 86-71/86-97 (U.S. July 22, 1986). The

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[9] Acquiring persons cannot compel prompt consideration of the voting rights issue by calling a special shareholders meeting under § 23-1-29-1 *et seq.* of the Business Corporation Law. First, Indiana law requires the holders of 25% of the shares to request a special shareholders meeting before it must be called by the corporation. IND. CODE § 23-1-29-2(a)(2). Many acquiring persons and most tender offerors will not have that level of share ownership. Second, Indiana law allows Indiana corporations to delay the notice of a special shareholders meeting for 60 days and forces the shareholders who called for a special meeting to then go to an Indiana court for an order compelling the corporate directors to hold a special meeting. IND. CODE § 23-1-29-3(2)(A). A mere 60 day delay subjects the "control shares" to redemption. IND. CODE § 23-1-42-10(a).

offer complied with the Williams Act and was designed to expire on April 10, 1986, 20 business days later. (DCA App. at 84.) DCA also announced a proxy campaign to elect its slate of nominees to the CTS Board of Directors at the April 24, 1986 Annual Meeting ("Annual Meeting"). (Id. at 12.)

As part of its effort to block DCA's tender offer and proxy solicitation,[10] CTS adopted the Chapter. (DCA App. at 52-57.) CTS said it would use the Chapter to remove the voting rights from the shares tendered to DCA by other shareholders. (Id. at 51; CTS App. at 34-35.) CTS also stated in filings with the District Court that it would not hold a special shareholders meeting on the voting rights issue before the Annual Meeting. (DCA App. at 50.)

Had CTS been able to enforce the Chapter, DCA could not have voted the tendered shares at the Annual Meeting. DCA therefore extended its tender offer and sought a declaratory judgment that the Chapter is unconstitutional. The District Court issued the declaratory judgment. The Seventh Circuit affirmed the District Court's decision on April 23, 1986, and DCA promptly purchased 1,000,000 of the tendered shares.

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[10] Among other things, CTS (1) invoked the Indiana Takeover Offers Act, IND. CODE § 23-2-3.1 *et seq.* (1986), by requesting a hearing before the Indiana Securities Commissioner on the adequacy of DCA's disclosures and filing an action in Indiana state court seeking to halt DCA's tender offer; (2) filed numerous counterclaims in the District Court seeking to enjoin DCA's tender offer and proxy solicitation on the grounds that, *inter alia*, DCA's disclosures were misleading and seating DCA's nominees on the CTS Board would violate Section 8 of the Clayton Act, 15 U.S.C. § 19 (1982); (3) adopted in succession three "poison pill" shareholder rights plans designed to thwart DCA's tender offer and proxy solicitation; and (4) issued false and misleading communications in connection with its adoption

## SUMMARY OF ARGUMENT

This appeal arises from the actions of current management and directors (collectively "management") of appellant CTS, who, in an all-out effort to defeat a tender offer from an out-of-state bidder which complied with all federal requirements, rushed to opt into the Chapter 16 months before it became generally applicable to all Indiana corporations.At issue is whether Indiana can insulate its resident corporations from the interstate markets for corporate control, assets and securities through legislation that conflicts directly with the investor protection goals and mechanisms established by Congress in the Williams Act, 15 U.S.C. §§ 781(i), 78m(d)-(e), 78n(d)-(f) (1982 & Supp. III 1985).

The Chapter, which can be invoked by management at will, strips voting rights from the securities that put a tender offeror over certain ownership thresholds. The tender offeror can only regain these voting rights by running a statutory gauntlet of pro-management provisions.

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10 *(Continued)*

of the second poison pill. Except with respect to the second poison pill, which CTS redeemed after an unfavorable Seventh Circuit decision, *see Dynamics Corp. of America v. CTS Corp.*, 805 F.2d 705 (7th Cir. 1986), and the third poison pill, the legality of which is before the District Court, the District Court, Seventh Circuit and Indiana Securities Commissioner have rejected all of CTS' defensive measures. The following is a list of the published opinions rendered in this case by the lower courts: 805 F.2d 705 (7th Cir. 1986); 794 F.2d 250 (7th Cir. 1986), *appeal docketed* Nos. 86-71/86-97 (U.S. July 22, 1986); 1986-1 Trade Cas. (CCH) ¶ 67,134 (7th Cir. April 23, 1986); 643 F. Supp. 215 (N.D. Ill. 1986); 638 F. Supp. 802 (N.D. Ill.), *aff'd in part and vacated and remanded in part*, 805 F.2d 705 (7th Cir. 1986); 637 F. Supp. 406 (N.D.Ill. 1986); 637 F. Supp. 389 (N.D. Ill.), *aff'd* 794 F.2d 250 (1986); 635 F. Supp. 1174 (N.D. Ill.), *aff'd in part, vacated in part and remanded in part*, 805 F.2d 705 (7th Cir. 1986); [Current Binder] Fed. Sec. L. Rep. (CCH) ¶ 92, 765 (N.D. Ill. 1986).

The Chapter empowers management to delay shareholder consideration of a resolution on the voting rights issue for up to 50 days. No rational tender offeror will purchase tendered shares until the voting rights issue is resolved because of the high risk of being left without voting rights to protect its investment.

Under the Chapter's regulatory scheme, shareholders are deprived of their ability freely to tender and sell their shares to the tender offeror. In effect the Chapter subjects the individual shareholder's investment decision to the approval of three groups: management, all shareholders and all "disinterested" shareholders.

The Chapter is *per se* violative of the Commerce Clause. As admitted by Indiana and counsel for CTS, the Chapter has a protectionist purpose. The Chapter directly regulates interstate securities transactions between nonresident shareholders and tender offerors. The Chapter has substantial discriminatory effects on interstate commerce. It discriminates against nonresident tender offerors in the interstate market for corporate control, impedes the interstate flow of corporate assets, forces economic operations that might be performed more efficiently elsewhere to be performed in Indiana, and unduly shifts its burdens to unrepresented out-of-state parties.

The Chapter heavily burdens the interstate markets for corporate control, corporate assets and securities. Indiana has little to counterbalance these burdens. It has no interest in protecting out-of-state shareholders. The *post hoc* rationalizations it offers for the Chapter are flimsy at best. The extreme pro-management bias of the Chapter is inconsistent with shareholder protection and the "threats" to which the Chapter purportedly responds are illusory. Appellants draw a false analogy between tender offers and fundamental corporate changes. Indiana law already regulates the way in which the tender offeror may use its shares if it wishes to make a fundamental

change in the corporate structure.

Congress has not delegated to the states the power to interfere with interstate tender offers. To the contrary, the Chapter is preempted by the Williams Act. Congress adopted a market method of tender offer regulation that is designed to provide information to shareholders, who then are free to choose to tender and sell their shares to the tender offeror. In direct contrast, the Chapter establishes a regulatory scheme that subjects investor free choice to the "tender mercies" of management and at least two groups of shareholders.

The Chapter also conflicts with the policy of neutrality that underlies the investor protections of the Williams Act. As Congress recognized, without this policy, management will be able to subvert shareholder free choice by thwarting value-maximizing tender offers. With its pro-management weapons, the Chapter threatens the very scheme of investor protections established by Congress.

Both the District Court and the Seventh Circuit saw through appellants' characterization of the Chapter as an innocuous and isolated piece of shareholder voting legislation. They properly gauged the severe practical impact of the Chapter and concluded that it regulates tender offers in a manner that violates both the Commerce and Supremacy Clauses.

## ARGUMENT

### I. THE CHAPTER VIOLATES THE COMMERCE CLAUSE

The Chapter is *per se* violative of the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, because (1) its acknowledged purpose is to protect Indiana companies from the interstate market for corporate control, (2) its method of achieving that purpose is the direct regulation of securities transactions between out-of-state shareholders and tender offerors, and (3) its provisions have discriminatory effects on interstate commerce. Furthermore,

the Chapter violates the Commerce Clause because its multiple burdens on interstate commerce greatly outweigh any local benefits.

Appellants' argument is driven by the assumption that if they characterize the Chapter *ipse dixit* as a harmless regulation of voting rights, it will withstand Commerce Clause scrutiny. Voting rights, however, do not exist in a vacuum. They are attached to securities that are traded in national – indeed international – markets.[11] No rational tender offeror will purchase shares without knowing whether they will include voting rights. To do so would be like buying a car before knowing whether it had an engine. Nor would any rational tender offeror buy shares lacking voting rights, leaving it unable to protect its investment. To do so would be like buying a house with no roof. By detaching the voting rights from the shares that are to be transferred in interstate tender offers, the Chapter necessarily regulates those tender offers. It chills the myriad of interstate transactions associated with each tender offer. Indeed, that is the Chapter's very purpose.

### A. The Chapter Has An Unlawful Protectionist Purpose

The Commerce Clause rests on the principle that the "states are not separable economic units." *Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978), *citing Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 538 (1949). Indiana may not "place itself in a position of economic isolation." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935). As this Court has declared, "[s]hielding in-state industries from out-of-state competition is almost never a legitimate

[11] State restrictions on international commerce are subjected to even more rigorous scrutiny. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 101 (1984). The markets for corporate control, corporate assets and corporate securities are all international in scope.

local purpose. . . ." *Maine v. Taylor,* 477 U.S.___, 106 S. Ct. 2440, 2453 (1986).

Appellants concede that the Chapter is designed to shield Indiana corporations from out-of-state competitors in the interstate market for corporate control. Counsel of record for CTS stated publicly that the Chapter is intended to deter nonresidents from acquiring control of Indiana corporations:

> When asked why Indiana had decided to adopt such a virulent statute, James Strain, an Indianapolis corporate lawyer from Barnes & Thornburg says, "We don't like having all our companies taken over by East Coast firms." On further reflection, Strain says Midwestern and West Coast acquirors are no better.

3 *Corporate Control Alert* 1, 10 (March 1986) (DCA App. at 61). Indiana admits that the Chapter is a "regulation of [corporate] takeovers,"[12] (Ind. Br. at 28), which is designed to check the *"removal"* of Indiana corporations "from the State," (Ind. Br. at 90-91.) (emphasis added).[13] This Court therefore need go no further to find the Chapter *per se* unconstitutional.

### B. The Chapter Directly Regulates Interstate Commerce

The Chapter is also *per se* violative of the Commerce

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[12] Indiana's statement that the Chapter is a "regulation of [corporate] takeovers" squarely contradicts its earlier assertion that the Chapter "does not govern or regulate tender offers . . . ." (Ind. Br. at 10.)

[13] The circumstances of Indiana's adoption of the Chapter further point up its protectionist purpose. The Chapter was passed after nonresidents made bids for two large Indiana corporations. 3 *Corporate Control Alert* 1, 10-11 (March 1986) (DCA App. at 61). It is part of a wave of protectionist anti-takeover legislation designed to avoid

*(Footnote continued on the following page)*

Clause because, like the anti-takeover act struck down in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), it directly regulates extensive interstate transactions in securities between nonresident shareholders and tender offerors. *See also Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. __, 106 S. Ct. 2080 (1986). Direct regulation of nonresidents is inevitable because the Chapter applies even if the tender offeror, 90% of the company's shareholders, the company'smanagement and its principal place of business are located outside Indiana. Indeed, where management owns at least 10% of the corporation's stock, the Chapter applies even if *all* of the non-management shareholders and the tender offeror are from out-of-state.

By arguing that the Chapter is designed to protect

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13 *(Continued)*

this Court's decision in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982). *See generally* Block, Barton and Roth, *State Takeover Statutes: The Second Generation*, 13 Sec. Reg. L. J. 332 (1986). One of the most common forms of "second generation" anti-takeover legislation has been control share acquisition statutes similar to Indiana's in both operation and effect. Such statutes have been stricken by every court to have considered their constitutionality. *See Gelco Corp. v. Coniston Partners*, Civ. No. 3-86-847 (D. Minn. Nov. 10, 1986) (Minnesota statute); *Fleet Aerospace Corp. v. Holderman*, 637 F. Supp. 742 (S.D. Ohio), *aff'd*, 796 F.2d 135 (6th Cir.), *appeal docketed*, No. 86-344 (U.S. Sept. 2, 1986) (Ohio statute); *Terry v. Yamashita*, 643 F. Supp. 161 (D. Haw. 1986) (Hawaii statute); *APL Ltd. Partnership v. Van Dusen Air, Inc.*, 622 F. Supp. 1216 (D. Minn.), *vacated on other grounds and appeal dismissed*, Nos. 85-5285/5286-MN (8th Cir. Nov. 26, 1985) (Minnesota statute); *Icahn v. Blunt*, 612 F. Supp. 1400 (W.D. Mo. 1985) (Missouri statute). State anti-takeover legislation often is passed in response to a bid for a state's company from an out-of-state bidder. *See, e.g., Icahn v. Blunt*, *supra* (bid for TWA triggered emergency passage of control share acquisition legislation).

"nondominant" shareholders from the effects of a nationwide tender offer *(see, e.g.,* CTS Br. at 34, 36), appellants have implicitly admitted that the Chapter is a direct regulation of interstate commerce. A state statute that "protects" all so-called nondominant shareholders regardless of their state of residence inevitably requires a direct and extraterritorial regulation of interstate commerce.

### C. The Chapter's Effects On Interstate Commerce Are *Per Se* Unconstitutional

Appellants ignore the Chapter's devastating effects on interstate commerce. This Court has emphasized repeatedly that in Commerce Clause cases "[t]he principal focus of inquiry must be the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects." *See, e.g., Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 37 (1980). Even if the Chapter served legitimate, non-protectionist purposes and did so without directly burdening interstate commerce (which it does not), it would still be *per se* violative of the Commerce Clause because its provisions (1) have a substantial discriminatory effect on nonresident tender offerors in the interstate market for corporate control, thereby (2) inhibiting the interstate transfer of corporate assets (3) requiring business operations to be performed in Indiana which could more efficiently be performed elsewhere and (4) benefitting the management of Indiana corporations at the expense of unrepresented out-of-state parties.

#### 1. The Chapter Has A Discriminatory Effect On Nonresident Tender Offerors In The Interstate Market For Corporate Control

The Chapter's burdens weigh heavily on interstate tender offers, which are a key mechanism in the operation of the interstate market for corporate control. By stripping voting rights from "control shares," the Chapter

removes all value from the tender offer transaction. Unlike other types of stock acquisitions, tender offers often are driven by the desire to purchase the element of potential corporate control that inheres in the voting rights attached to each share of common stock. Tender offerors typically pay a sizeable "control premium" to shareholders as consideration for these voting rights. *See generally* Jensen and Ruback, *The Market for Corporate Control: The Scientific Evidence*, 11 J. FIN. ECON. 5 (1983). The Chapter falls more harshly upon tender offerors than upon other acquirors by stripping only the voting rights attached to the block of shares that puts a tender offeror over one of the ownership thresholds. Tender offerors purchase shares in large blocks, while other acquirors may cross a threshold through small open market or privately negotiated purchases and the like.[14]

Because it allows incumbent management to opt out of or to opt back into its provisions *after* a tender offer has been made, the Chapter imposes upon even the most intrepid tender offeror an unacceptable investment risk wholly external to the market. The opt-in/opt-out risk destroys the integrity of the securities market. Management alone has possession of material information not available to the market – whether it will in fact opt into the Chapter, opt out of the Chapter, redeem the acquiror's shares or recommend that shareholders reattach some measure of voting rights to the tendered shares. This uncertainty imposes heavy costs on the tender offeror, who must comply with the provisions of the Chapter even before they are applicable or risk finding itself in violation of state law if management opts back into the Chapter. The practi-

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[14] Among all the interstate securities transactions to which the Chapter applies, tender offers are especially vulnerable to the opt-in/opt-out provision because they alone must be held open for 20 business days.

cal impact is to deter tender offers for Indiana corporations.

The Chapter's discriminatory effect on tender offers necessarily results in discrimination against nonresidents. Because the securities market is international in scope, most bidders for and shareholders of sizeable, publicly traded Indiana corporations will be nonresidents. Given the Chapter's disparate impact on out-of-state bidders and shareholders, its facial neutrality *vel non* is irrelevant. This case is no different from numerous decisions of this Court striking down facially neutral regulations which disproportionately affect out-of-state parties and impede the flow of interstate commerce. *See, e.g., Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945).

### 2. The Chapter Impedes The Interstate Transfer Of Corporate Assets

The Chapter also restricts the interstate transfer of corporate assets by disrupting corporate control transactions requisite to those transfers. A tender offeror who later acquires control of a corporation may shift to another state the assets of a newly acquired corporation to take advantage of a business opportunity. *See generally* Ginsburg and Robinson, *The Case Against Federal Intervention in the Market for Corporate Control*, 1986 Winter/Spring Brookings Rev. 9. Given its protectionist purpose, it is hardly surprising that the Chapter blocks the flow of corporate assets from Indiana to other states. The Chapter has the same impact as the statute struck down in *Hughes v. Oklahoma*, 441 U.S. 322 (1979). It restricts the out-of-state transfer of a local resource. *See also Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

While the Chapter restricts the flow of corporate assets *from* Indiana to its sister states, it also inevitably curtails the flow of corporate assets *into* Indiana. After acquiring control of an Indiana corporation, some out-of-state tender offerors no doubt will transfer corporate assets into Indiana to take advantage of business oppor-

tunities or to reverse incumbent management's policy of undercapitalization. Unlike the state in *Maine v. Taylor*, 477 U.S.___, 106 S. Ct. 2440 (1986), which had compelling health and safety reasons for banning the importation of certain species of fish, Indiana has no compelling justification for restricting the importation of these corporate assets.

**3. The Chapter Requires Economic Operations To Be Performed In Indiana Which Could More Efficiently Be Performed Elsewhere**

The interstate market for corporate control, if unimpeded by protectionist legislation, consists of a continuing series of securities transactions which lead to transfers of control over corporate assets to parties who can make more efficient and profitable use of those assets.[15] Jensen and Ruback, *The Market for Corporate Control: The Scientific Evidence*, 11 J. FIN. ECON 5 (1983); *see also* Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965). Where incumbent management resists such corporate control transactions, a tender offer is often the only method of maximizing shareholder wealth. *See generally* Easterbrook and Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L REV. 1161 (1981); Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 TEX. L. REV. 1 (1978).[16]

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[15] This market is extremely large. In 1985 there were 3,001 corporate control transactions of $500,000 or more. 3 *Corporate Control Alert* 1, 8 (April 1986) (DCA App. at 62). The total purchase price of these transactions was $179.6 billion. *Id.*

[16] The other securities transactions that may effect a change in control, such as mergers, exchange of stock and sale of the com-

*(Footnote continued on the following page)*

The Chapter, by its very design, allows the incumbent management of Indiana corporations to block the interstate transfer of corporate control even if the transfer would result in a more efficient use of corporate assets, increase shareholder wealth and have the support of a majority of *all* shareholders. Indiana shields its corporations from the very bidders who believe they can employ the corporate assets more profitably, thereby interrupting the natural interstate exchange of corporate control and impeding the market process toward greater performance efficiency. *See* Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 STAN. L. REV. 819, 853-854 (1981). Even if Indiana were pursuing a legitimate local interest, the Chapter's effect of forcing business operations to be performed in Indiana which could more efficiently be performed elsewhere is *per se* unconstitutional. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970); *Toomer v. Witsell*, 334 U.S. 385, 403-406 (1948).

### 4. The Chapter Benefits The Management Of Indiana Corporations At The Expense Of Unrepresented Nonresident Parties

The Chapter impermissibly furthers "[e]conomic protectionism" by giving Indiana corporations "an advantage over consumers" of corporate control in other

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16 *(Continued)*

pany, are largely governed by incumbent management. Only proxy challenges are initiated by shareholders and their ineffectiveness prompted the rise of tender offers. Gilson, *A Structural Approach To Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 STAN. L. REV. 819, 843 (1981). Tender offers are extended directly to the shareholders, who, protected by the Williams Act, may choose to tender their shares for sale to the tender offeror based upon their own investment criteria and without undue pressure from management or the tender offeror.

states. *Brown-Forman Distillers Corp.*, 106 S. Ct. at 2088. Indiana deputizes the management of its corporations to deprive potential nonresident acquirors of the competitive advantages they may have earned for themselves in the interstate market for corporate control through their greater efficiency, management skills and business acumen. *See Hunt v. Washington Apple Advertising Comm'n.*, 432 U.S. 333, 351 (1977). The Chapter gives to the management of Indiana corporations competitive advantages which they have failed to earn. It does so by disadvantaging nonresidents.

The Chapter's burdens fall most heavily on out-of-state parties who were not represented in the Indiana legislature. *See South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 92 (1984); Romano, *The Political Economy of Takeover Statutes*, 41 Va. L. Rev.___(1987) (forthcoming in February, 1987). It leaves Indiana corporations free to acquire corporations in other states and to shift newly acquired corporate assets to Indiana.[17] It places no limits on the transfer out of state of Indiana corporate assets by the management of Indiana corporations, but prevents out-of-state acquirors from doing the same. Those out-of-state acquirors had no say in the Indiana legislature, even though the Chapter is a major obstacle to their obtaining control over Indiana corporations. Nor were out-of-state shareholders of Indiana corporations represented, even though the Chapter will deprive them of the premiums and the profits from efficiency gains that result from tender offers.

The primary recourse for these unrepresented parties

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[17] Indeed, in 1982 CTS availed itself of the interstate market for corporate control by using a tender offer to help effect a merger between one of its subsidiaries and a Minnesota corporation. *See CTS Reports on Tender* (NEXIS, PR Newswire, Feb. 26, 1982); *CTS Corp. Acquisition* (NEXIS, PR Newswire, Jan. 11, 1982).

is to persuade their own state legislatures to pass protectionist legislation that will reverse the Chapter's effects. The Chapter thus portends a wave of retaliatory legislation. If appellants' position were law, each state would be free to "experiment," not with creative economic development programs, but with various ways to prevent nonresident tender offerors from obtaining control of resident corporations, while giving resident corporations free rein to obtain control of out-of-state corporate assets and to shift those assets to the "experimenting" state. *See Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 538-39 (1949).[18]

Appellants seek to excuse these systemic biases by claiming that potential in-state bidders for Indiana corporations "virtually" represented the interests of nonresident bidders in the Indiana legislature. (CTS Br. at 34; Ind. Br. at 85.) The number of Indiana bidders who might be burdened by the Chapter, however, is disproportionately low compared to the number of burdened out-of-state bidders. Moreover, their political influence in the Indiana legislature is weaker than that of the Indiana business interests protected by the Chapter. Indiana corporate bidders also receive a benefit from the Chapter not available to out-of-state bidders – they are shielded from bids from acquirors located in Indiana's 49 sister states. Even the resident shareholders of Indiana corporations are not likely to be as organized or as potent a force in the Indiana legislature as are the local business interests who saw the Chapter as a means of insulating Indiana corporations from the market for corporate control and keeping in Indiana corporate assets that might be utilized more efficiently elsewhere. State anti-takeover statutes are typi-

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[18] CTS anticipates this argument by claiming that the state of Indiana is free to be wrong. (CTS Br. at 47.) But Indiana is not even free to be right in its experiment where, as here, it discriminates against interstate commerce.

cally the product of the local business community. *See Romano, supra.* The Chapter is no exception, 3 *Corporate Control Alert* 1, 10-11 (March, 1986).

### D. The Chapter's Unnecessary Burdens On Interstate Commerce Far Outweigh Any Local Benefits

The Chapter's *per se* invalidity obviates the need for this Court to engage in any balancing of local and national interests. But even if the Chapter were not unlawful *per se,* its unnecessary burdens on interstate commerce impermissibly exceed its putative local benefits. *See Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970).

#### 1. The Burdens On Interstate Commerce Are Great

Indiana has used the Chapter to "slow or freeze the flow of commerce for protectionist reasons . . . by erecting a barrier against the movement of interstate trade." *Philadelphia v. New Jersey,* 437 U.S. 617, 628 (1978); *see also Dean Milk Co. v. Madison,* 340 U.S. 349, 354 (1951). The Chapter burdens three large and vigorous interstate markets. It chills the market for corporate control by hindering the operation of a key component of that market – the tender offer mechanism. The Chapter inhibits the operation of the market for corporate assets, whose liquidity depends on transfers in corporate control. *See* Bradley, Desai and Kim, *The Rationale Behind Interfirm Tender Offers,* 11 J. FIN. ECON. 183, 183-84 (1983). The Chapter also disrupts the interstate market in securities by forcing shareholders who want to sell their shares to tender offerors to obtain the approval of at least two groups of shareholders.

This Court has recognized the harm to the national economy and shareholders nationwide when a state blocks a tender offer that complies with the Williams Act:

Shareholders are deprived of the opportunity to

> sell their shares at a premium. The reallocation of economic resources to their highest valued use, a process which can improve efficiency and competition, is hindered. The incentive the tender offer mechanism provides incumbent management to perform well so that stock prices remain high is reduced.

*MITE*, 457 U.S. at 643.

### 2. The Chapter's Benefits Are Negligible

Indiana and CTS have settled on two *post hoc* rationalizations for the Chapter: (1) protection of "nondominant" shareholders, and (2) protection of local economic interests. Neither of these purported benefits would outweigh the Chapter's many burdens on interstate commerce even if they were real. But they are not.

#### a. The Rationale of Protecting Nondominant Shareholders Is A Pretext

This Court has already decided that a state has "no legitimate interest in protecting the nonresident shareholders." *See MITE*, 457 U.S. at 644. By claiming that its statute is designed to protect so-called nondominant shareholders *nationwide*, Indiana gives this Court little to weigh in the balance against the Chapter's burden on interstate commerce. This is particularly true because management's opt-in/opt-out exemption power is inconsistent with shareholder protection, the Chapter is not rationally related to its purported shareholder protection goal, and the Chapter is based on irrational premises.

##### i. Management's Exemption Power Is Inconsistent With Shareholder Protection

Like the statute in *MITE*, the Chapter allows management to invoke the Chapter to defeat a "hostile" tender

offer.[20] The Chapter will protect tendering shareholders from no one but themselves by subjecting their voluntary sale of securities to the approval of at least two shareholder groups: all shareholders and "disinterested" shareholders. Having used the Chapter to defeat a tender offer, management can exempt itself from the Chapter in order to conduct a defensive self-tender or to promote a "friendly" tender offer. In such a case, the so-called nondominant shareholders are left with what appellants would have this Court believe are the inadequate investor protections of the Williams Act. This sharp incongruity between the *post hoc* rationalization for a statute and its practical effects "tend[s] to undermine appellant's justification for the burdens the statute imposes on interstate commerce." *MITE*, 457 U.S. at 644. *See also Raymond Motor Trans., Inc. v. Rice*, 434 U.S. 429, 446-47 (1978).

### ii. The Chapter Is Not Rationally Related To Its Purported Purpose

Even if the purpose of the Chapter were the protection of nondominant shareholders, the Chapter is intolerably overbroad and underinclusive. The Chapter is overbroad because it is not limited to "coercive" partial tender offers or even to all partial tender offers. It comes into play indiscriminately and applies to "any and all" tender offers, open market purchases, privately negotiated stock purchases and the full range of other share acquisitions regardless of the effect of these acquisitions on shareholders. It applies regardless of whether the share acquisition is intended to or even can lead to actual control over the operation of the corporation. Yet, it is also capriciously underinclusive be-

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[20] Management and shareholders have divergent interests when corporate control is at stake. *See, e.g., Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954-55 (Del. 1985) (noting the "omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders" when responding to a tender offer).

cause it establishes procedures by which management may exempt certain self-serving control share transactions by opting out of the Chapter.

The poor fit between the Chapter and its purported purpose is even more intolerable because the Chapter is unnecessary. Other Indiana laws are tailored to prevent oppressive conduct by a large shareholder, are not triggered at the whim of management and are far less restrictive of interstate commerce. Indiana, for example, requires shareholder approval of mergers, IND. CODE § 23-1-40-3, the sale of corporate assets, IND. CODE § 23-1-41-2, and the dissolution of the corporation, IND. CODE § 23-1-45-2(b)(2). Indiana vests its shareholders with dissenter's rights. IND. CODE § 23-1-44-1 *et seq.*. Indiana allows its corporations to protect their shareholders against financially inadequate second stage transactions by adding, with shareholder approval, a fair price amendment to the corporate charter. *See Dynamics Corp. of America v. CTS Corp.*, 805 F.2d 705, ___ (7th Cir. 1986) (slip op. at 13). *See also* IND. CODE § 23-1-43-1 *et seq.* (statutory fair price amendment). "Dominant" shareholders are also restrained by the fiduciary obligations they owe to other shareholders under Indiana law.[21]

Finally, the Chapter disserves a shareholder protection purpose. It distorts shareholder choice. The Chapter gives management – which otherwise would have no direct role in the tender offer except for opining on its merits to the shareholders – the opportunity to preempt shareholder choice by wielding a formidable array of pro-management provisions against tender offers. Indeed, the Chapter permits a minority of so-called disinterested shareholders to

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[21] The Williams Act as well ensures that the shareholders will know the second stage plans of the partial tender offeror by requiring the offeror to state what major changes it plans to make in the structure or operation of the corporation. 15 U.S.C. § 78m(d)(1)(C).

block a majority of shareholders from selling their shares to the tender offeror.

### iii. The Chapter Is Based Upon Irrational Premises

The very notion that interstate tender offers must be heavily burdened in order to protect some shareholders against other "dominant" shareholders rests upon at least three premises so irrational that they belie the Chapter's purported purposes. The first premise is that partial tender offers are bad because they (a) sometimes result in the purchase of shares by a party who may (b) sometimes become a "dominant" shareholder and who may (c) sometimes arrange a second step transaction that may (d) sometimes yield shareholders a lower premium than they received initially. This, of course, also assumes that no statutory fair price amendment exists (as it does in Indiana, IND. CODE § 23-1-43-1 *et seq.*) or that the corporation has not adopted its own fair price amendment. Indiana's premise is not only attenuated, it is erroneous. No necessary connection exists between partial tender offers and "coercive" second-step transactions. Many partial tender offers are not followed by second-step transactions. Securities and Exchange Commission's Advisory Committee on Tender Offers, *The Economics of Partial and Two-Tier Tender Offers*, 49 FED. REG. 26755 (1984). Moreover, the empirical data show that the premiums offered shareholders in any and all tender offers exceed the sum of the premiums offered shareholders in two-step transactions by only a small margin. *Id.* at 26759.

The second erroneous premise is that stock ownership as low as 20% gives the acquiring person actual control over the corporation. Suppose, for example, four factious individuals each purchased 20% of the stock of an Indiana corporation. The Chapter would regulate each shareholder as an "acquiring person." Yet, can appellants contend with a straight face that any of these shareholders have

"control" over the corporation? And can they honestly suggest that by crossing the Chapter's 20% threshold, DCA somehow obtained "control" over CTS? The fact is that after acquiring a 27.5% ownership position in CTS through its tender offer, DCA lost its bid to seat its slate of directors on the CTS Board. By no stretch of the imagination is DCA in "control" of CTS. DCA cannot compel or block the sale or merger of CTS or force any other fundamental change in the corporation.

Finally, the Chapter irrationally assumes that "acquiring persons" pose a threat to "nondominant" shareholders. Not only is there no logical link between tender offers by an "acquiring person" and the exploitation of minority shareholders, but small shareholders typically benefit from the presence of a large shareholder. Schleifer and Vishny, *Large Shareholders and Corporate Control*, 94 J. POL. ECON. 461 (1986). Large shareholders have both the incentive to monitor aggressively management's performance and the financial resources to do so. The benefits that result from such monitoring inure to all shareholders. The presence of a large shareholder also facilitates corporate control transactions that provide shareholders with opportunities for both control premiums and increased profits from the more efficient use of corporate assets. *See generally* Holderness and Sheehan, *Raiders or Saviors? The Evidence on Six Controversial Investors*, 14 J. FIN. ECON. 555 (1985). The data show that the presence of a large shareholder typically causes an increase in the value of the company's stock. Mikkelson and Ruback, *An Empirical Analysis of the Interfirm Equity Investment Process*, 14 J. FIN. ECON. 523 (1985).

### b. The Chapter Provides No Legitimate Benefit To Other Local Interests

Indiana concedes that the Chapter was motivated by its desire to protect local economic interests from the effect of interstate tender offers. (Ind. Br. at 90-91.) But, as this Court observed in *Lewis v. BT Inv. Managers, Inc.*:

> In almost any Commerce Clause case it would be possible for a State to argue that it has an interest in bolstering local ownership, or wealth, or control of business enterprise. Yet these arguments are at odds with the general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition.

447 U.S. at 43-44. If, as Indiana admits, the Chapter attempts to shield Indiana economic interests from outside competition in the market for corporate control, it is *per se* unlawful. Even if the Chapter is not *per se* unconstitutional, Indiana's interest in protecting local business does not shield the Chapter from Commerce Clause scrutiny. Indiana would have this Court weigh in its favor the economic welfare of employees, shareholders and other nonmanagement parties. The Chapter, however, does not protect these interests. It delegates to incumbent management enforcement powers and lacks regulatory standards designed to protect nonmanagement interests.[22]

### 3. Appellants' "Internal Corporate Affairs" Argument Is Without Merit

Appellants argue that the Chapter is an innocuous regulation of the internal affairs of Indiana corporations

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[22] The Chapter therefore is not analogous to the Maryland statute prohibiting vertically integrated petroleum producers and refiners from operating local retail outlets upheld in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124-25 (1978). The Maryland statute was passed not for protectionist purposes,

*(Footnote continued on the following page)*

that gives shareholders the right to ratify a fundamental change in the structure of the corporation by approving or disapproving a tender offer. They analogize the Chapter to provisions requiring shareholder approval of mergers and other changes in the structure of the corporation.

Appellants' analogy, however, is wrong. In rejecting this overworked analogy in *MITE*, this Court recognized that tender offers do not implicate the internal affairs of the corporation. *MITE*, 457 U.S. at 645-46.[23] Tender offers are transactions in interstate commerce between the tender offeror and shareholders through which the tender offeror assembles a block of shares. Tender offers themselves do not change the fundamental structure of the corporation. Nor do they define "relationships among or between the corporation and its current officers, directors,

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22 *(Continued)*

but in response to market data which revealed the inequitable distribution of gasoline among retailers during a period of short supply. Maryland reduced that inequity *not* by deterring all out-of-state retail competitors, but by measures precisely tailored to eliminate the inequities. The Maryland law thus permitted many interstate competitors to enter local markets.

The Chapter, in contrast, blocks all nonresident competitors in the interstate markets for corporate control and assets. Indiana admittedly protects local corporations by stopping the flow of *all* control share transactions, leaving no interstate competition. *See Lewis v. BT Inv. Managers, Inc.* 447 U.S. 27, 42 (1980). Because the Maryland statute upheld in *Exxon* left out-of-state petroleum retailers on an equal competitive footing with existing in-state retailers, that statute did not significantly affect the overall level of local competition in the industry. The Chapter, however, will depress competition between incumbent management and out-of-state acquirors for control of Indiana corporations.

[23] This Court also observed that the "internal affairs doctrine" is not a product of corporation law at all, but a "conflict of laws principle." *MITE*, 457 U.S. at 645.

and shareholders." *See MITE*, 457 U.S. at 645.

A tender offer alone does not give the tender offeror control over a corporation, but only a block of shares. Mikkelson and Ruback, *An Empirical Analysis of the Interfirm Equity Investment Process*, 14 J. FIN. ECON. 523, 550 (1985). To effect any change in the structure or control of the corporation, the offeror must exercise the voting power attached to the purchased shares. All attempts by successful tender offerors to parlay their share ownership position into control over the corporation, and especially any attempt on their part to effect a change in the corporate form, are subject to a vast range of regulations under state law. Indiana law, for example, guarantees shareholders an opportunity to elect the corporation's board of directors and to approve a merger, sale of corporate assets, dissolution of the corporation and other initiatives that directly affect the structure of the corporation.[24]

Notwithstanding appellants' dire warnings, this Court's decision affirming the Seventh Circuit would not federalize state corporate law. To the contrary, it is the Indiana legislature that has attempted to federalize its own corporate law. Even if the Chapter were construed as a regulation of the "internal affairs" of Indiana corporations, its burden on interstate commerce far outweighs the local benefits. The Chapter must fall because its method of regulating control interferes directly with the operation of the tender offer mechanism, thus discriminating against interstate commerce. The Seventh Circuit properly

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[24] Shareholder approval of changes in the control over or structure of the corporation provides a critical check on the controlling party's actions in arranging transactions which implicate the corporate form. In telling contrast, Indiana law does not require shareholder approval of tender offers and other "control share" acquisitions, but leaves to management substantial discretion in applying the Chapter.

focused on the real world impact of the Chapter on interstate commerce and its decision stands for the unremarkable proposition that a state law that has a "direct, substantial and intentional" effect upon interstate commerce by interfering with the tender offer mechanism is unconstitutional. *See Dynamics*, 794 F.2d at 264.

### 4. Congress Has Not Delegated This Regulatory Authority To The States

Appellants' effort to derive congressional approval for the Chapter from Section 28(a) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78bb(a) (1982) must fail. That section was designed to preserve blue sky laws, which long preceded the Exchange Act and the protections of which apply only to resident investors. *See* 1 L. Loss, *Securities Regulation* 30-31 (2d. ed. 1961). As appellants well know, congressional authorization of state legislation which interferes with interstate commerce "must be unmistakably clear." *Maine v. Taylor*, 477 U.S.___, 106 S. Ct. 2440, 2448 (1986). Section 28(a), 15 U.S.C. §78bb(a), is not an "unmistakably clear" delegation to the states of the power to interfere with the interstate markets in corporate control, assets and securities.[25] Not only has Congress failed to authorize the Chapter, but it has preempted it.

## II. THE CHAPTER IS PREEMPTED BY THE WILLIAMS ACT

The Chapter is preempted because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting

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[25] Section 28(a) states in relevant part: "Nothing in this title shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any state over any security or any person insofar as it does not conflict with the provisions of this title or the rules and regulations thereunder."

the Williams Act. *Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1941). The Indiana legislature has established a regulatory scheme that conflicts with the execution and accomplishment of Congress' investor protection objectives.

### A. The Chapter Conflicts With The Williams Act's Market Method Of Investor Protection

Even if the Chapter were designed to protect investors,[26] it conflicts with the method of investor protection selected by Congress. Congress selected a "market" method of tender offer regulation which is based upon disclosure and designed to promote investor free choice. *See generally Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1276 (5th Cir. 1978), *rev'd on venue grounds sub nom., Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979). Indiana has established a paternalistic regulatory scheme that usurps investor free choice.

The Williams Act amendments to the Exchange Act were passed in 1968 to extend the federal securities laws' disclosure provisions into the largely unregulated field of tender offers.[27] In constructing legislation to accomplish its investor protection goal, Congress chose between two different methods, one based upon disclosure and the other upon externally imposed principles of "fairness" or "artificiality." *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 8 n.8 (1985). *See also Kidwell*,

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[26] As demonstrated at pages 21-25, *supra*, appellants' investor protection rationale is a pretext at best. In offering that rationale, appellants acknowledge the Chapter's repudiation of Congress' evenhanded market approach. Thus, the Chapter is defended as a means of avoiding the "unfair treatment" of shareholders. *See, e.g.*, CTS Br. at 25.

[27] Prior to the mid-1960's, corporate takeover attempts had typically involved either proxy solicitations, regulated under Section 14 of the Securities Exchange Act of 1934, 15

*(Footnote continued on the following page)*

*supra.* at 1279. Congress rejected the latter approach. *Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearings on S. 510 Before the Subcomm. on Securities of the Senate Committee on Banking and Currency*, 90th Cong., 1st Sess. 1, 198 (1967) [hereinafter Full Disclosure Hearing] (Second Statement of Manuel F. Cohen, Chairman Securities and Exchange Commission) ( . . . this bill does not contemplate nor does it provide for substantive regulation of tender offers . . . )

As with its other legislation in the federal securities field, Congress concluded that the only way to protect investors without also chilling legitimate transactions (in this case, tender offers) in the underlying market was through a "calculated reliance on disclosure." *See Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 8 n.8 (1985). The *MITE* plurality outlined the method of tender offer regulation adopted by Congress:

> . . . Congress intended to strike a balance between the investor, management, and the takeover bidder. The bidder was to furnish the investor and the target company with adequate information . . .

*MITE*, 457 U.S. at 634. The plurality also cautioned that Congress had rejected any regulatory approach that supplanted investor free choice:

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27 *(Continued)*

U.S.C. § 78n (1964), or exchange offers of securities, subject to the registration requirements of the Securities Act of 1933, 15 U.S.C. § 77e (1964). H.R. Rep. No. 1711, 90th Cong., 2d Sess., *reprinted* in 1968 U.S. CODE CONG. & ADMIN. NEWS 2811. When Congress passed the Williams Act, only Virginia had a statute regulating tender offers. Take-Over-Bid Disclosure Act, VA. CODE ANN. § 13.1-528 (1985 Replacement Volume). There is no indication that Congress was aware of the Virginia statute, which was passed only four months before the Williams Act. Nor is there any evidence in either the text of the Williams Act or its legislative history that Congress ever intended or expected states to play an active role in tender offer regulation.

> ... but there was no "inten[tion] to do ... more than give incumbent management an opportunity to express and explain its position." [citation omitted] Once that opportunity was extended, Congress anticipated that the investor, if he so chose, and the takeover bidder should be free to move forward within the time frame provided by Congress.

*Id.* at 634. *See also Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975).

The Williams Act, therefore, is finely tuned to facilitate informed shareholder choice based on the investment criteria of each shareholder and the disclosures of the tender offeror and management. H.R. Rep. No. 1711, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2811; *see also*, S. Rep. No. 550, 90th Cong., 1st Sess. (1967). The Williams Act requires both the tender offeror and management to disclose information to the shareholder erelevant to the tender offer decision. 15 U.S.C. § 78m(d). In addition, it insulates the shareholder from any external pressures affecting his or her decision whether to tender shares for sale to the tender offeror. *See* 15 U.S.C. § 78m(d)(1).[28]

The Chapter deprives individual shareholders of the free choice guaranteed to them by this federal regulatory scheme. It anoints three overlapping factions of guardians: management and at least two groups of shareholders. Each shareholder group has independent veto power over the individual shareholder's decision to sell shares to the tender offeror. The Chapter does not provide these guar-

[28] Thus, tender offerors must hold open their tender offers for 20 business days, 17 C.F.R. § 240.14e-(1a) (1986), shareholders can withdraw their tendered shares during specifically established periods, 15 U.S.C. § 78n(d)(5), tender offerors must accept shares on a pro rata basis, 15 U.S.C. § 78n(d)(6), and tender offerors must pay the same consideration to all tendering shareholders. 15 U.S.C. § 78n(d)(7).

dians with additional tools to "protect" shareholders from the very tender offeror to whom they may have already tendered their shares. Neither the tender offeror nor incumbent management is required to make any additional disclosures that might assist shareholder guardians in making the voting rights decision. Yet, that decision will determine the tender offeror's fate.[29] If even one group of shareholder guardians rejects the tender offer, the Chapter will have undone the myriad of investment decisions of the individual shareholders.

The Chapter imposes the sort of external restrictions on shareholder free choice that were rejected by Congress. It also confounds the Williams Act's market approach to tender offer regulation by forcing shareholders to make the voting rights decision with no guarantee of adequate information. If Indiana believes that the Williams Act provides the shareholder guardians with the information necessary to make an informed decision on the voting rights issue, then the Chapter's expensive and time-consuming procedures are superfluous, albeit highly obstructive of tender offers and inconsistent with the Williams Act's approach. If Indiana believes that the voting rights decision upon which the success of every tender offer depends is an important component of the tender offer process, then the Chapter's pro-management bias and lack of disclosure requirements ill-equip it to promote informed shareholder decisionmaking and likewise conflict with Congress' market approach.

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[29] Moreover, once a tender offeror has purchased shares, the other shareholder guardians have no incentive to vest the tender offeror's shares with voting rights because this would only dilute the voting power of their shares.

### B. The Chapter Frustrates The Williams Act's Investor Protection Purpose By Conflicting With Its Policy Of Neutrality

The Williams Act's investor protections rest upon a careful balance struck by Congress between incumbent management and tender offerors. S. Rep. No. 550, 90th Cong., 1st Sess. 1, 3 (1967); *see also* H.R. Rep. No. 1711, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2811. Congress established a policy of neutrality between management and the tender offeror as "a major aspect of the effort to protect the investor." *MITE*, 457 U.S. at 633 (plurality opinion). *See also Piper v. Chris-Craft Indus.*, 430 U.S. 1, 29-30 (1977).

Congress adopted this policy of neutrality after painstaking deliberation. Initially, the drafters of the Williams Act considered regulating tender offers by strengthening the position of both management and shareholders vis-à-vis tender offerors. Senator Williams introduced a precursor bill to the Williams Act with a message entitled "Protection Against Corporate Raiders," that decried "proud old companies [being] reduced to corporate shells after white collar pirates have seized control." S. 2731, 89th Cong., 1st Sess. 111 CONG. REC. 28257 (1965). The most potent pro-management feature of this precursor bill was a provision requiring tender offerors to disclose to management their intent to make a tender offer 20 days before commencing the offer. When coupled with a 20 business day waiting period, this provision would have given management approximately 50 days to take defensive measures against a tender offer.

But after hearing extensive testimony on the benefits of tender offers to shareholders and the success of management in defeating tender offers, *see, e.g.*, Full Disclosure Hearing, *supra*, Congress acknowledged that investors benefit from the continued operation of the tender offer mechanism. H.R. Rep. No. 1711, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. CODE Cong. & ADMIN. NEWS

2811. Senator Williams disclaimed any Congressonal intent to impair the operation of the tender offer mechanism by favoring incumbent management. *See, e.g.*, 113 Cong. Rec. 5854 (1967)("Every effort has been made to avoid tipping the balance of the regulatory burden in favor of management or in favor of the offeror."). Consequently, Congress removed all precommencement notification requirements from the Williams Act. Instead, Congress protected the investor "by witholding from management or the bidder any undue advantage that could frustrate the exercise of an informed choice." *MITE*, 457 U.S. at 634.[30]

The Chapter returns to management the "undue advantage" withheld by Congress. Indiana severely handicaps tender offerors by giving management its most potent defensive weapon: delay.[31] *See MITE*, 457 U.S. at 637-638. It resurrects the very 50 day window for defensive tactics that Congress expressly rejected when it deleted from the

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[30] CTS cites this very language, but then makes the inconsistent claim that the Chapter, by regulating only "post-acquisition voting rights," addresses concerns "entirely different" from ensuring that "the investor makes an 'informed choice' whether to tender his shares." (CTS Br. at 24-25.) In attempting to find some rationale for the Chapter, of course, CTS tries to convince this Court of the opposite proposition, that the Chapter has everything to do with ensuring that the investor makes an informed choice. *See, e.g.*, CTS Br. at 25, 26, 37-40.

[31] Congress recognized the harmful consequences of delay in the tender offer process when it enacted the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 1311 *et seq.* (1982) ("Hart-Scott-Rodino Act"):

> [I]t is clear that this short waiting period [the 10-day period for proration provided by § 14(d)(6) of the Securities Exchange Act, which applies only after a tender offer is commenced] was founded on congressional concern that a longer delay might

*(Footnote continued on the following page)*

Williams Act the 20-day precommencement notification requirement.[32] The Chapter's procedure for holding a spe-

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31 *(Continued)*

> unduly favor the target firm's incumbent management, and permit them to frustrate many pro-competitive cash tenders. This ten day waiting period thus underscores the basic purpose of the Williams Act–to maintain a neutral policy towards cash tender offers, by avoiding lengthy delays that might discourage their chances for success.

H.R. Rep. No. 1373, 94th Cong., 2d Sess. 12, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 2572, 2644; *see also*, 122 CONG. REC. 30877 (1976) (Statement by Representative Rodino). Incredibly, Indiana analogizes the Chapter to the Hart-Scott-Rodino Act in support of its claim that the Chapter will not interfere with tender offers. (Ind. Br. at 68-69.) Indiana ignores the fact that the Hart-Scott-Rodino Act accelerates the regulatory review process in the case of cash tender offers so that review can be completed within the 20 business day Williams Act waiting period. *See* 16 C.F.R. § 803.10(b) (1986).

32 Congress repeatedly has rejected precommencement notification provisions that would have extended tender offers beyond 20 business days. In 1965, Congress rejected a proposed 20 day prenotification requirement. *See* S. 2731, 89th Cong., 1st Sess., 111 CONG. REC. 28257, 28259 (1965). In 1967, Congress rejected a five-day prenotification requirement. S. Rep. No. 550, 90th Cong., 1st Sess. 1, 4 (1967); *Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., lst Sess. 72-75, 87-89, 98, 105, 139-40, 151, 163, 245 (1967); *Takeover Bids: Hearings on H.R. 14475 and S. 510 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 2d Sess. 1, 44-46, 50-54 (1968). In 1970, Congress rejected 30-day prenotification proposal. *See Investor Protection in Corporate Takeovers: Hearings on H.R. 4285, S. 3431 and S. 336 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 1, 6-7 (1970). In 1975 Congress rejected two bills which would have required a 60-day precommencement filing. S. 2522, 94th Cong., 1st Sess., 121 CONG. REC. 32839, 32840 (1975); H.R. 10650, 94th Cong., 1st Sess., 121 CONG. REC. 35640 (1975).

cial shareholders meeting guarantees management over three additional weeks to implement a variety of defensive measures designed to thwart the tender offer. Tender offerors cannot purchase tendered shares after the expiration of the Williams Act's 20 business day waiting period. They must wait at least 50 days to buy what the shareholders tendered: an equity security with full voting rights.

The Chapter not only arms management with delay, it also:

(1) Vests management with discretion to invoke the Chapter;

(2) Increases the amount and scope of proxy materials;

(3) Subjects the shareholder's decision to sell securities to an effective veto by management and at least two groups of shareholder guardians;

(4) Permits management to redeem tendered shares pursuant to its own procedures;

(5) Raises transaction costs of making a tender offer; and

(6) Gives management complete control over the Chapter's enforcement mechanism.

Indiana argues that the Chapter is not preempted by the Williams Act because tender offerors may condition their tender offers on the eventual approval of a voting rights resolution by the shareholder guardians. (Ind. Br. at 65.) This argument ignores the fact that before the voting rights issue is resolved, management has free rein to take other defensive steps that will diminish the value of tendered shares. The same argument can be made to excuse any pro-management restriction on the tender offer process, no matter how burdensome. A tender offeror could just as easily condition its tender offer if the Chapter imposed a delay of 50 weeks rather than 50

days. But Congress did not empower the states to burden the tender offer process with delay, uncertainty and additional costs under the banner of "investor protection." Indiana's compliance manual only illustrates how tender offerors must modify substantially their tender offers from the Williams Act norm to comply with the Chapter.

CTS concedes that "Congress *itself* did not wish to 'tip the balance' " between tender offerors and management, but argues that the congressional policy of neutrality places no limits on the power of a state to impair the operation of the tender offer mechanism in order to protect the management of its corporations. (CTS Br. at 21, 22.) Appellants' Supremacy Clause argument is nothing less than the blanket assertion that Indiana has unbridled discretion to impose on the tender offer process burdens of any magnitude. Whatever role is left to the states in the field of securities regulation after over 50 years of extensive federal involvement, it certainly does not include enacting legislation which admittedly is in conflict with the Williams Act. Appellants' inverted view of federalism was repudiated by *MITE* and fails to acknowledge that Congress believed that tender offer regulation tipped in management's favor would be inconsistent with the Williams Act.

## CONCLUSION

For the foregoing reasons, the decision of the Seventh Circuit Court of Appeals should be affirmed.

Dated: January 20, 1987

Respectfully submitted,

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Nos. 86-71, 86-97



IN THE

# Supreme Court of the United States

October Term, 1986

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CTS CORPORATION,
*Appellant,*
v.
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STATE OF INDIANA,
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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## JOINT BRIEF OF THE INDIANA CHAMBER OF COMMERCE AND INDIANA LEGAL FOUNDATION, INC. AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS CTS CORPORATION AND THE STATE OF INDIANA

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## JOINT BRIEF OF THE INDIANA CHAMBER OF COMMERCE AND INDIANA LEGAL FOUNDATION, INC. AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS CTS CORPORATION AND THE STATE OF INDIANA

The Indiana Chamber of Commerce and Indiana Legal Foundation, Inc. respectfully submit this joint brief as *amici curiae* in support of Appellants CTS Corporation and the State of Indiana, with the consent of the parties, to urge the Court to reverse that part of a decision by the United States Court of Appeals for the Seventh Circuit which held that portions of the Indiana Business Corporation Law were unconstitutional under the Supremacy Clause and the Commerce Clause.

## STATEMENT OF INTEREST

The Indiana Chamber of Commerce ("Indiana Chamber") is the largest association of businesses in Indiana, having more than 4,500 business firms as members. A very large percentage of these members are firms organized and doing business as corporations under the laws of Indiana. Some are corporations publicly traded on securities exchanges, others are not traded on exchanges but have enough shareholders to be subject to the statutory provisions at issue in this case, and still others are closely-held corporations. Indiana Legal Foundation, Inc. ("Foundation") is a private, not-for-profit corporation that represents a group of business and industrial concerns from across the State of Indiana in litigation involving broad and significant legal questions.

The Indiana Chamber and the Foundation are concerned about this case because they believe the State of Indiana should have a general corporation statute that has as one of its primary goals the fair treatment of corporate shareholders *as a whole* and that allows members of corporate management to pursue the type of business strategy that they, as the *elected* representatives of the shareholders, deem to be in the best overall and long-range interests of the corporation and its shareholders. One of the State's tools for effecting these goals, the Control Share Acquisitions Chapter, Ind. Code Ann. § 23-1-42-1, *et seq.* ("Control Share Chapter"), was effectively declared

unconstitutional on its face by the United States Court of Appeals for the Seventh Circuit. The entire Indiana Business Corporation Law ("IBCL"), of which the Control Share Chapter is but one small part, was prepared in 1985 by the Indiana General Corporation Law Study Commission, and the Indiana Chamber assisted the Commission in the process of developing ideas for and drafting the IBCL in part because the Indiana Chamber's members favored the type of fair and reasonable provisions that are set forth in the Control Share Chapter. Neither the Indiana Chamber nor the Foundation support any unfair treatment of tender offers. In fact, the Indiana Chamber has members who would not want to be precluded from making tender offers for Indiana corporations.

## SUMMARY OF ARGUMENT

The Control Share Chapter does not regulate the purchase and sale of shares in tender offers, which is the subject of the Williams Act. The Control Share Chapter establishes, in effect, a permissive corporate charter provision which governs the voting rights of shares under certain change of control circumstances. The validity of shareholder rights charter provisions is invariably determined on the basis of state law. Attempts by Congress to adopt legislation regulating shareholder rights charter amendments have thus far failed.

As the Control Share Chapter is the functional equivalent of a shareholder rights charter amendment, and as shareholder rights amendments are immune from constitutional attack, the Seventh Circuit's holding has created the anomaly that Indiana is forbidden to automatically include the Control Share Chapter in charters of its domestic corporations (subject to a corporation's right to opt out of the Control Share Chapter), but is free to invite its domestic corporations to adopt the identical provisions *with impunity* on their own. Not only is this result illogical, but it conflicts with the traditional

right of a state to govern the relationships among its corporations and their officers, directors and shareholders. The line should be drawn on preemption by the Williams Act between statutes that regulate the purchase and sale of shares in tender offers and those that do not.

In applying the benefit/burden test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), under the Commerce Clause, the Seventh Circuit adopted its own economic theory to demonstrate conclusively that any putative benefits to legally cognizable Indiana constituencies would be insignificant. The *amici*, on the other hand, believe that there are real and substantial benefits from the Control Share Chapter for Indiana corporations and their shareholders, officers and directors. This disagreement illustrates the dispute among those who have given serious thought to the issues in the tender offer debate. The *amici* believe that in the absence of any evidence of the Control Share Chapter's effect on Indiana constituencies and in the absence of federal legislation, the Court should defer to the policy decision of the State of Indiana, in accordance with the presumption of the constitutionality of state statutes in areas traditionally regulated by the states.

Finally, the *amici* believe that a close examination of the operation of the Control Share Chapter leads to the conclusion that it will not in any way preclude tender offers for Indiana corporations. Several strategies for conducting a tender offer, consistent with the Control Share Chapter, are evident.

## ARGUMENT

The overarching issues before the Court in this case are (a) whether federal law so dominates the tender offer arena that any state action having some effect on tender offers violates the Supremacy Clause of the United States Constitution, even if it is an action traditionally within the exclusive province of the states, and (b) whether the appellate court's benefit/burden analysis under the

Commerce Clause of the United States Constitution, which amounts to a judicially enunciated national policy opposing state statutes that affect tender offers, will be approved. The Control Share Chapter has been labeled by the Seventh Circuit as an anti-takeover statute and a "lethal dose" for takeovers of Indiana corporations by hostile tender offers. Appendix to Jurisdictional Statement of Appellant CTS Corporation ("CTS App.") at A23. Unquestionably, the Control Share Chapter *affects* tender offers under certain circumstances. After all, it may be inferred from the language of the Control Share Chapter and of other shareholder protection provisions of the IBCL that the Control Share Chapter was adopted to correct perceived abuses. However, the Control Share Chapter does not *regulate* tender offers, and the real and substantial benefits the Control Share Chapter provides to Indiana shareholders outweigh any incidental effects it may have on tender offers for the shares of Indiana corporations.

The Indiana Chamber and the Foundation will not repeat in this brief the analyses of CTS Corporation and the State of Indiana demonstrating that the Control Share Chapter does not violate either the Supremacy Clause or the Commerce Clause. The Indiana Chamber and the Foundation will focus instead on three points they believe to be particularly significant in evaluating those analyses. They believe, first, that the Control Share Chapter is in the nature of a shareholder rights charter provision operative only *after* a control share acquisition and, therefore, cannot be preempted by the Williams Act. Secondly, they believe that the Control Share Chapter provides substantial benefits and that, in the absence of federal legislation, the presumption of the constitutionality of state statutes in traditionally state-regulated areas should govern rather than the unsubstantiated economic theory of the Seventh Circuit. And, finally, the Indiana Chamber and the Foundation are convinced that a careful analysis of the Control Share Chapter reveals that its presumed role in

deterring tender offers is materially overstated. This brief is intended to underline, from a public policy perspective, the conclusions that CTS Corporation and the State of Indiana reach following more traditional Supremacy Clause and Commerce Clause analyses.

## I. The Control Share Chapter is in the Nature of a Shareholder Rights Charter Provision and is not Preempted by the Williams Act.

As the operation and effect of the Control Share Chapter are essentially the same as many types of shareholder rights charter provisions and the Control Share Chapter is not concerned with the activities regulated by the Williams Act, it is both illogical and improper to conclude that the Williams Act preempts the Control Share Chapter.

### A. The Control Share Chapter does not Regulate the Purchase and Sale of Shares and, Therefore, is not Preempted by the Williams Act.

The Control Share Chapter does not in any way regulate the buying and selling of shares in a tender offer or otherwise. The Control Share Chapter in effect does nothing more than establish a permissive corporate charter provision which governs the voting rights of shares under certain change of control circumstances. Shares of any public Indiana corporation subject to the IBCL are subject to the provisions of the Control Share Chapter, unless the corporation opts out,[1] as part of the share contract. The Control Share Chapter thus defines certain of the rights of shares, and it is the bundle of share rights, the share contract, which is bought and sold in the market.

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[1] The effective date of the IBCL is August 1, 1987. However, before its effective date a corporation may, under Ind. Code Ann. § 23-1-17-3(b), elect to have most of its provisions, including the Control Share Chapter, apply to it. At any time, a corporation may elect under Ind. Code Ann. § 23-1-42-5 not to be governed by the Control Share Chapter.

Generally, the Williams Act regulates the purchase and sale of corporate shares by means of tender offers, not, as the Seventh Circuit stated, the "interstate traffic in corporate control." CTS App. at A24; *see Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 22-24 (1977) (summarizing the Williams Act); *Edgar v. MITE Corp.*, 457 U.S. 624, 632 (1982) (also briefly summarizing the Williams Act). For example, where a battle for corporate control has nothing to do with the buying and selling of shares in a tender offer, such as in a proxy contest or an open-market stock accumulation,[2] the Williams Act is wholly inapplicable.

The Control Share Chapter differs fundamentally from other state statutes which are sometimes denominated "control share acquisition" statutes. The Control Share Chapter affects how control shares are treated *after their purchase* in relation to other shares of the corporation, rather than regulating in any way the purchase or sale of shares in the first instance. This sets the Control Share Chapter apart from the Williams Act and is the heart of the distinction between the area covered by federal tender offer regulation and traditional state corporate law. The governance of tender offers and the governance of internal corporate matters have never been held to intersect. *See Edgar v. MITE Corp.*, 457 U.S. 624, 645-646 (1982) (the "internal affairs doctrine" was of no avail to supporters of an Illinois takeover statute because the statute regulated the buying and selling of shares, not the relationships among or between the corporation and its officers,

[2] For a discussion of a successful application of this emerging takeover technique, *see* Hertzberg & Rundle, *Campeau's Victory in Battle for Allied Signals Big Changes in Takeover Tactics*, Wall St. J., Nov. 4, 1986, at 2, col. 3.

directors and shareholders).[3] The Control Share Chapter is the functional equivalent of a shareholder rights charter provision governing voting rights, and the adoption of any such provision is an internal corporate matter.

### B. Shareholder Rights Charter Provisions are Regulated Solely by State Law.

The remarkable increase in tender offers in recent years has led to the development of a wide variety of provisions in corporate charters and by-laws adopted for the purpose of making corporations less attractive takeover candidates and to ensure fair treatment of non-tendering shareholders in the event of a takeover. Winter, Stumpf & Hawkins, *Shark Repellents and Golden Parachutes: A Handbook for the Practitioner*, at 3-5; Bebchuk, *Toward Undistorted Choice and Equal Treatment in Corporate Takeovers*, 98 Harv. L. Rev. 1693, 1744 (1985). Provisions in use today range from staggered terms for members of the board of directors to provisions for the issuance of bargain-price securities to shareholders in the event of a control share acquisition, which are sometimes referred to as "poison pills."[4] *See, generally*, Securities Exchange Act Release No. 15230 (October 13, 1978), [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,748; Wander & LeCoque, *Boardroom Jitters: Corporate Control Transactions and Today's Business Judgment Rule*, 42 Bus. Lawyer 29 (November 1986); Winter, Stumpf & Hawkins, *Shark Repellents*.

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[3] All of the post-*MITE* cases in which takeover statutes have been struck down under the Supremacy Clause have involved statutes that restricted in some way the purchase of shares. None considered the issue of voting rights apart from stock ownership. *Icahn v. Blunt*, 612 F. Supp. 1400 (W.D. Mo. 1985); *APL Limited Partnership v. Van Dusen, Inc.*, 622 F. Supp. 1216 (D. Minn. 1985); *Fleet Aerospace Corp. v. Holderman*, 796 F.2d 135 (6th Cir. 1986).

[4] For consistency, such provisions, whether amendments to or original provisions in corporate charters, articles of incorporation or by-laws, will hereinafter be referred to as "shareholder rights provisions."

The courts have analyzed the legality of these provisions on two levels: First, whether the adoption of the amendment by the board and/or the shareholders was authorized by a state enabling statute (which is typically the state's general corporation statute), or was without statutory authorization and, therefore, illegal or *ultra vires*. Second, whether the board violated its fiduciary duty to the shareholders by adopting an amendment unfair to the shareholders and tending to entrench the incumbent management, or acted in good faith in the best interests of the corporation and its shareholders.

In *Moran v. Household International, Inc.*, Del, 500 A.2d 1346 (1985), the Delaware Supreme Court upheld the adoption of a complicated "poison pill" charter amendment pursuant to which Household's shareholders would receive the right to buy preferred shares in Household or common shares in the corporation surviving a hostile merger with Household at a discounted price in the event of the acquisition or the threatened acquisition of control shares of Household. After concluding that the board had authority to adopt the amendment under the Delaware General Corporation Law and that the provisions giving that authority were not preempted by the Williams Act and did not violate the Commerce Clause, the court held that the board adopted the plan "in the good faith belief that it was necessary to protect Household from coercive acquisition techniques," and not for the purpose of entrenching itself. *Id.* at 1357. Therefore, the board's adoption of the shareholder rights plan did not violate its fiduciary duty to the shareholders.

In *Minstar Acquiring Corp. v. AMF Inc.*, 621 F. Supp. 1252 (S.D.N.Y. 1985), the target corporation's board adopted a number of shareholder rights provisions, including a "poison pill." The court (applying New Jersey law) found that the "poison pill" amounted to a major change in the structure of the corporation's capitalization and in shareholder voting rights and, consequently, could

only be approved with a shareholder vote. *Id.* at 1259. The board's adoption of the "poison pill" without the shareholders' approval was an *ultra vires* act. *Id.* The court also held that the non-transferability of the rights package issued to shareholders after the tender offer trigger was an unreasonable restraint on alienation of property and, therefore, illegal under New Jersey law. *Id.* at 1258.

Although shareholder rights provisions often have the effect of deterring tender offers, their validity is invariably determined on the basis of state law. For reasons which will be discussed *infra*, statutory provisions enabling the adoption of shareholder rights amendments have not been successfully challenged under the Supremacy Clause. Congress has so far been unwilling to enter into the regulation of shareholder rights provisions. For example, recent efforts to nullify the business judgment rule — which promotes adoption of defensive measures by creating the presumption that board actions have been taken in the best interests of the corporation and its shareholders — by federal legislation have failed. *See* ABA Securities Regulation Committee, *Annual Review of Federal Securities Regulation*, 40 Bus. Lawyer 997, 1017 (1985) (discussing H.R. 5695, 98th Cong., 2d Sess. (1984)). Corporate boards today may adopt shareholder rights amendments unrestricted by federal law and, by virtue of the business judgment rule, with a limited amount of protection in most states against being second-guessed by the courts as to their motives.

### C. The Control Share Chapter is Equivalent to a Moderate Shareholder Rights Charter Provision.

The Control Share Chapter shares characteristics with various types of shareholder rights provisions. For example, a Delaware corporation's charter contained a control shares voting provision very similar in effect to the Control Share Chapter in *Providence & Worcester Co. v. Baker*, Del., 378 A.2d 121 (1977). The Delaware Supreme

Court upheld the charter provisions as consistent with the state's general corporation statute.[5] The voting plan in *Providence & Worcester* provided that each common share up to 50 for each shareholder had one vote, and each common share in excess of 50 for each shareholder had one-twentieth of a vote. In addition, no shareholder could vote more than 25% of the total number of voting shares except by proxy. As with the Control Share Chapter, shares had different voting rights depending on which shareholder held them. Plans similar to the charter provisions in *Providence & Worcester* were upheld under Iowa law in *Kersten v. Pioneer Hi-Bred International, Inc.*, 626 F.Supp. 647 (N.D. Iowa 1985), and found to be *ultra vires* under New Jersey law in *Asarco Inc. v. Court*, 611 F. Supp. 468 (D. N.J. 1985). In each case, the plan's validity was determined pursuant to state law, not the Williams Act.

The shareholder rights plan at issue in *Moran v. Household International, Inc.*, Del., 500 A.2d 1346 (1985), provided, among other things, for the issuance of one "right" per common share to pre-acquisition shareholders in the event any single entity or group acquired 20% or more of Household's shares. A "right" was exercisable to purchase a fractional share of preferred stock, or, in the event of a subsequent merger, a "right" could be exercised to purchase $200 of the common stock of the survivor for $100. The plan did not prohibit or restrict in any way the purchase of shares by a tender offeror. Both the Control Share Chapter and the shareholder rights plan in *Moran* concern the treatment of shares *after their purchase* in relation to other shares of the corporation. Unlike the shareholder rights plan, however, the Control Share Chapter permits the post-acquisition dilution of voting rights to be reversed by a simple majority of the shareholders.

[5] The lawsuit did not arise in connection with a tender offer. The only issue was whether the charter provisions were authorized by the state statute.

In cases such as these, courts struggle to find the proper balance between the right of shareholders to have unobstructed access to tender offerors and the legitimate concern that not all tender offers are in the best interests of the shareholders as a whole. Indiana endured the same struggle in crafting the Control Share Chapter and resolved it by giving the shareholders the right to determine whether control of the corporation will change.

D. **Eliminating the Control Share Chapter While Permitting Similar Provisions as Charter Amendments is Illogical and not Required by the Williams Act.**

Although the Control Share Chapter and several types of shareholder rights provisions may operate very similarly and produce similar results, the Control Share Chapter is an explicit provision of a state statute, and charter amendments are adopted by boards of directors (sometimes with and sometimes without shareholder approval). The court in *Moran v. Household International, Inc.*, Del., 500 A.2d. 1346, 1353 (1985), rejected the argument that the provisions of the Delaware General Corporation Law authorizing the shareholder rights plan at issue were preempted by the Williams Act. The court held that the action of a board of directors in adopting a shareholder rights amendment is a private action. *Id.* The fact that the adoption took place pursuant to a state statute did not provide a sufficient "nexus" to the state to constitute state action in conflict with the Williams Act. *Id.; see also Data Probe Acquisition Corp. v. Datatab, Inc.*, 722 F.2d 1, 5 (2d Cir. 1983), *cert. den.*, 465 U.S. 1052 (1984); *Schreiber v. Burlington Northern, Inc.*, 472 U.S. ____, 86 L.Ed.2d 1, 9 (1985) (provisions of the Williams Act not "an invitation to the courts to oversee the substantive fairness of tender offers . . ."). The consequence of these holdings is simply to

immunize shareholder rights provisions from constitutional attack.[6]

Combining the *Moran* decision with the Seventh Circuit's decision in this case creates the anomaly that a shareholder rights provision, no matter how much it operates to discourage or even eliminate the possibility of tender offers, will be judged solely on state law grounds, while the same provision, if effectively included in the corporation's charter by statute, will be judged by its compliance with the Williams Act. Indiana could spell out the terms of the Control Share Chapter in the State's general corporation statute as a charter amendment that boards of directors of Indiana corporations would be *authorized* to adopt, and provide that its adoption would not constitute a breach of the board's fiduciary duty to the shareholders, and the provision would be immune from Supremacy Clause challenge.[7] In that case, the only

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[6] The *Moran* court did not decide the question of whether the Williams Act would have preempted the shareholder rights plan at issue if there had been state action connected with its adoption.

[7] It is well established that a state has the right to determine the fiduciary duties of corporate directors, and, consequently, to eliminate them in connection with certain actions. *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 479 (1977) (fiduciary standards with respect to corporate transactions vary from state to state and applying a "federal fiduciary principle" would overlap and possibly interfere with state corporate law); *Cort v. Ash*, 422 U.S. 66, 84 (1975) (state fiduciary standards put shareholders on notice of which duties directors of their corporations have and which duties they do not have).

It is probably inaccurate to speak of the duties of corporate directors as "fiduciary duties," as if directors were subject to the same duty of care as trustees. Kaplan, *Fiduciary Responsibility in the Management of the Corporation*, 31 Bus. Lawyer 883, 886-888 (1976). In fact, the duty of care and the duty of loyalty owed by directors to shareholders are simply two of many duties of corporate directors set forth at common law, in state statutes and even in some federal statutes. State general corporation statutes vary considerably in the

*(Footnote continued)*

difference from the Control Share Chapter would be that the board would have the choice to opt in to the provision rather than the choice to opt out. The shareholders would have the same level of protection under either scenario, because the State, the directors, and the shareholders themselves would all be deciding what is in the best interests of the shareholders as a whole.

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*(Footnote continued)*

myriad of duties required of directors and in the standards to which directors are held in performing those duties. It is not unprecedented for a state to relieve directors from liability for actions "traditionally" (*i.e.*, at common law or under a prior general corporation statute) the responsibility of the board of directors. *See, e.g.*, McKinney's N.Y. Bus. Corp. Law § 620(f) (charter provision placing certain board duties in the hands of the shareholders, subject to the consent of all of the shareholders, relieves directors of liability for negligence in the performance of such duties).

The IBCL, a comprehensive corporate statute of which the Control Share Chapter is but one of many integral parts, contains numerous other provisions changing directors' duties and liabilities from those under prior law. For example, the statute provides that directors will not be liable for any action or failure to take action unless the director has breached or failed to perform certain enumerated duties and such breach or failure to perform constitutes *willful misconduct or recklessness* (Ind. Code Ann. § 23-1-35-1(a) and (c)); that directors may, in considering the best interests of a corporation, consider the effects of an action on shareholders, *employees, suppliers and customers of the corporation, and communities in which offices or other facilities are located* (Ind. Code Ann. § 23-1-35-1(d)); that a corporation has much broader powers to indemnify an individual and advance expenses if that individual is made party to a proceeding because the individual is or was a director (Ind. Code Ann. §§ 23-1-37-1 through 15); and that the directors are empowered to establish a corporate committee to determine whether it is in the best interests of the corporation that a proceeding be continued in which the rights of the corporation are asserted derivatively (Ind. Code Ann. §§ 23-1-32-1 through 5). Delaware has also recently modified its general corporation statute to allow shareholders to include in the corporate charter a provision limiting directors' monetary liability for certain types of breaches of fiduciary duty. Del. Gen. Corp. Law § 102(b)(7).

It is difficult to believe that the intent of the Williams Act was to give constitutional significance to the trivial distinction between the way Indiana actually chose to exercise its prerogatives and the way it could have exercised them. The fact that the adoption of the Control Share Chapter is consistent with a state's traditional right to govern the relationships among its corporations and their officers, directors and shareholders makes the anomaly even harder to accept. *See Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 478-479 (1977) ("Absent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden"); *Cort v. Ash*, 422 U.S. 66, 83-85 (1975) ("Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation").

By no means do the *amici* favor all shareholder rights provisions. They do favor the type of provisions contained in the Control Share Chapter, because they are tempered and fair. The question the *amici* pose is whether the Williams Act was ever intended to grow to so dominate the tender offer arena that the traditional right of states to enact such provisions concerning the internal affairs of their domestic corporations would be in peril.

There is no evidence that the Williams Act was intended to prevent a state from effectively inserting into the charters of its corporations a shareholder rights provision that it could just as easily have permitted corporate directors to adopt on their own *with impunity*. The State's action is consistent with the traditional right of states to govern the internal affairs of their domestic corporations and is not inconsistent with the Williams Act's regulation of

buying shares in a tender offer. A line has to be drawn somewhere on the preemptive power of the Williams Act. The Indiana Chamber and the Foundation believe that to be logical and consistent with over 160 years of jurisprudence, from *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), to the present, the line should be drawn between statutes that regulate the purchase and sale of shares in tender offers and those that do not. Such a rule would be consistent with the text of the Williams Act, its legislative history and its interpretation by this Court. At the same time, it would not imperil the traditional role of the states in governing the internal affairs of their domestic corporations. Under such a rule, there would be no constitutional conflict between the Williams Act and the Control Share Chapter.

## II. The Control Share Chapter Produces Significant Benefits, and any Burdens it Imposes on Interstate Commerce are Negligible.

The heart of the Seventh Circuit's holding that the Control Share Chapter is unenforceable by reason of the Commerce Clause is that the Control Share Chapter impairs the interstate market for corporate control. In its most telling statement, the Seventh Circuit said:

> "Even if a corporation's tangible assets are immovable, the efficiency with which they are employed and the proportions in which the earnings they generate are divided between management and shareholders depends on the market for corporate control — an interstate, indeed international, market that the State of Indiana is not authorized to opt out of, as in effect it has done in this statute." CTS App. at A26.

In the absence of any evidence as to the Control Share Chapter's effect on CTS Corporation and its shareholders, directors, officers and employees, the Seventh Circuit adopted the foregoing theory to prove that shareholders of

large Indiana corporations are unequivocally hurt by the Control Share Chapter. It is worth pointing out that the Seventh Circuit's theory is, in fact, just a theory. The Control Share Chapter provides a number of benefits for Indiana corporations, shareholders, directors, officers and employees, and to the extent the Court is not persuaded, by virtue of the divergent views of the eminent commentators on this point, the presumption that the Control Share Chapter is constitutional should apply. As for the alleged burdens brought about by the Control Share Chapter, the Seventh Circuit materially overstated the degree to which the Control Share Chapter is likely to affect tender offers without any specific analysis of its probable operation in practice.

### A. The Control Share Chapter's Benefits Should not be Determined by the Seventh Circuit's Unsubstantiated Economic Theory.

In analyzing the Control Share Chapter, the Seventh Circuit followed the balancing test set out in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).[8] In applying that test, the Seventh Circuit held that the legally cognizable interest of the State of Indiana — the welfare of Indiana residents — is not furthered by the Control Share Chapter and might even be hindered by it. CTS App. at A25. The Indiana Chamber and the Foundation are compelled to ask how, with no evidentiary record in this case and conflicting authority from the academic experts, the Seventh Circuit could so confidently make this assessment of the putative benefits to Indiana residents. Contrary to the Seventh Circuit, the Indiana Chamber and the Foundation believe that there are real and substantial benefits from the Control Share Chapter which flow to Indiana corporations

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[8] CTS Corporation has taken the position that the Court should not even reach the *Pike* balancing test in holding that the Control Share Chapter does not violate the Commerce Clause. The *amici* agree, but assume, *arguendo*, for purposes of this brief, that the balancing test applies.

and their shareholders, officers and directors. Among those benefits are: First, the Control Share Chapter protects all shareholders by providing for shareholder approval of any change of control proposal, as in other similar corporate transactions. Second, the Control Share Chapter protects the minority shareholders by giving them dissenters' rights in the event a change of control is approved against their wishes. And, third, the Control Share Chapter promotes better corporate governance through the recruitment and retention of quality directors to govern Indiana corporations.[9] These benefits accrue to the advantage of the corporations, their employees, and the communities in which they are located.

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[9] As is apparent from the remainder of the IBCL, the Indiana legislature was concerned with, among other things, protecting the quality of corporate governance in Indiana corporations by granting certain protections to corporate directors. (*See* note 7, *supra*, concerning the provisions of the IBCL dealing with directors' duties and liabilities.) It is well documented that the proliferation of actions against directors and the increased cost (and even unavailability) of director and officer liability insurance have led to a reluctance of individuals to serve as directors of publicly held corporations. *See, generally*, Bishop, *Law of Corporate Officers and Directors: Indemnification and Insurance*; Baum & Byrne, *The Job Nobody Wants: Outside Directors Find that the Risks and Hassles Just Aren't Worth It*, Bus. Wk., Sept. 8, 1986, at 56. It is a legitimate legislative concern that it is difficult for corporations to recruit and retain highly qualified individuals to serve as directors — particularly outside directors. The Control Share Chapter provides to shareholders the positive benefits of a control share acquisitions charter amendment without action by the directors that might be challenged as a breach of fiduciary duty. Similarly, the Control Share Chapter addresses the concern that the *absence* of employing defensive tactics in response to a hostile takeover might constitute a breach of fiduciary duty if it turns out that the terms of the offer were not in the best interests of the corporation or the shareholders. *See* Wander & LeCoque, *Boardroom Jitters: Corporate Control Transactions and Today's Business Judgment Rule*, 42 Bus. Lawyer 29, 49 (1986).

The benefits of the Control Share Chapter as understood by *amici* and the absence of such benefits in the view of the Seventh Circuit reveal the disparity of views on this subject. The magnitude of legal and business articles on the subject indicates that there is widely-held disagreement with respect to the benefits and burdens of takeovers.[10] As one commentator has put it, "[t]he debate has not gone on long enough for definitive solutions to a problem we are only beginning to understand. The empiric data is inadequate, and most important, there is no consensus on the goals we are trying to reach." Subak, *Takeovers: Where Are We? Where Do We Go?*, 41 Bus. Lawyer 1255, 1256 (August 1986). Into this climate of confusion and raging debate, the Seventh Circuit has attempted to inject certainty by simply

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[10] *Compare* Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 Harv. L. Rev. 1161 (1981) (no resistance to tender offers by incumbent management can be justified), *with* Lowenstein, *Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation*, 83 Colum. L. Rev. 249 (1983) (the advantages possessed by tender offerors under the current regulatory environment justify at least some obstructive tactics on the part of the incumbent board), *and* Bebchuk, *Toward Undistorted Choice and Equal Treatment in Corporate Takeovers*, 98 Harv. L. Rev. 1693 (1985) (neither unrestrained tender offers nor defensive tactics by management serve the best interests of corporate shareholders). *Compare* Ginsburg & Robinson, *The Case Against Federal Intervention in the Market for Corporate Control*, Brookings Review (Winter/Spring 1986) at 9 (the theory that the threat of tender offers forces management into a short-sighted strategy of maximizing current profits is incorrect), *with* Scherer, *Takeovers: Present and Future Dangers*, Brookings Review (Winter/Spring 1986) at 15 (takeovers have not resulted in improved post-takeover performance by acquired corporations). *Compare* Melloan, *New Debate Over Corporate Governance*, Wall St. J., Nov. 11, 1986, at 32, col. 3 (quoting those who argue that the threat of hostile tender offers makes incumbent management more responsive to the rights of shareholders), *with* Melloan, *The Backlash Against Corporate Raiders*, Wall St. J., Nov. 12, 1986, at 32, col. 3 (quoting a chief executive officer who argues that market competition forces efficient management and that the threat of hostile tender offers encourages excessive leveraging of assets).

saying that one argument is right and all the others are wrong.

In the absence of a resolution of the many issues surrounding tender offers by federal legislation, and in the absence of any evidence as to the benefits and the burdens of the Control Share Chapter, the presumption that state statutes in areas traditionally and properly regulated by the states are constitutional should be respected. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959) ("If there are alternative ways of solving a problem, we do not sit to determine which of them is best suited to achieve a valid state objective. Policy decisions are for the state legislature, absent federal entry into the field"). Deferring to the policy decision of the State of Indiana would also promote one of the benefits of federalism — that states may act as laboratories for competing theories about governing. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); Ginsburg & Robinson, *The Case Against Federal Intervention in the Market for Corporate Control*, Brookings Review (Winter/Spring 1986) at 9, 14. Of course, the Commerce Clause is not subservient to this "laboratory" philosophy. However, when there is a genuine issue, as a matter of economic theory, as to whether legitimate state interests are furthered or hindered by a statute, the "laboratory" approach is appropriate.

In the final analysis, the State's policy decision will be tested in the marketplace. If the Control Share Chapter truly has the effect of decreasing shareholder wealth, in our free society shareholders will presumably be moved to invest in corporations chartered in states with different corporate laws. The market value of shares in publicly held Indiana corporations will decline, and growing Indiana businesses will have trouble going public. In short, if the Seventh Circuit's economic theory is correct and the Control Share Chapter operates in practice the way the Seventh Circuit speculated it would, Indiana businesses in general will pay the price. The *amici* do not share the Seventh Circuit's economic theory.

### B. The Control Share Chapter is Far Less Burdensome to Tender Offerors Than the Seventh Circuit Believed.

The Seventh Circuit held that a state statute that effectively eliminates the possibility of tender offers succeeding, or of even being launched, is in mortal conflict with the Commerce Clause. The *amici* believe that a review of the actual operation of the Control Share Chapter will demonstrate that it does not set up a "gauntlet" that is incapable of being run.

Under the Control Share Chapter, if the shares acquired in a control share acquisition will put the acquiring person (a tender offeror or any other type of acquiror) over one of the three percentage control thresholds, the acquired shares will not have voting rights unless the shareholders of the target corporation approve a resolution reinstating voting rights for such shares. The issue of voting rights for the acquired shares will be determined at the next special or annual meeting of shareholders unless the acquiring person submits an acquiring person statement, in which case, if requested, the issue will be presented to a special meeting of the shareholders within 50 days of the request.

Several strategies for effectively conducting a tender offer for control, consistent with the Control Share Chapter, are evident. One option is simply to make a tender offer in compliance with the Williams Act for the number of shares the tender offeror desires to acquire, buy the shares, file an acquiring person statement, and begin a campaign to convince a majority of the shareholders to vote in favor of voting rights for the acquired shares. Nothing in the Control Share Chapter prohibits communicating with the shareholders prior to the vote. If unsuccessful in the shareholders' vote, the tender offeror will still own the acquired shares and will have all the rights with respect thereto, except voting rights. Furthermore, the tender offeror can sell his non-voting shares to one or more buyers, with full voting rights, provided no buyer exceeds a control threshold as a result of such purchase.

A more cautious option for the tender offeror would be to submit an acquiring person statement without launching a tender offer. After the date is set for the special shareholders' meeting, the tender offeror could solicit proxies to be used in voting on the voting rights issue or communicate in some other way with the shareholders. If the tender offeror wins the shareholder vote 50 days (or less) later, he can launch the tender offer.

Probably the option most likely to be used is for the tender offeror to simply launch a conditional tender offer. The terms of the tender offer would be that the tender offeror would purchase all tendered shares (up to the limit set forth in the offer), but only if a majority of the shareholders ultimately vote to reinstate the voting rights of the acquired shares. *See MacFadden Holdings, Inc. v. JB Acquisition Corp.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,939 (2nd Cir. October 6, 1986) (holding that shares can be tendered pursuant to a tender offer conditioned upon certain regulatory approvals). The tender offeror's chances of winning the vote would be substantial, because those who have tendered their shares would have a financial interest in voting in favor of voting rights in the absence of an intervening higher offer. The tender offeror could further enhance his chances by soliciting proxies to be used at the special shareholders' meeting or by communicating in some other way with the shareholders. Obviously, if the tender offeror loses the shareholder vote, he loses the expenses of the tender offer, just as any unsuccessful tender offeror would, but he avoids becoming a substantial shareholder without commensurate voting rights.

## CONCLUSION

Because the Control Share Chapter is not concerned with the buying and selling of shares in tender offers and is in the nature of a shareholder rights provision operative only *after* a control share acquisition, it is not preempted by the Williams Act. The *amici* believe the Control Share Chapter provides substantial benefits to Indiana constituencies with very little burden on tender offerors. The intense disagreement among those who have analyzed the issues in the tender offer debate should be resolved by the presumption of constitutionality of state statutes of this type, in the absence of evidence in this case and in the absence of action by Congress. The Seventh Circuit's holding that the Control Share Chapter is unconstitutional by virtue of the Supremacy Clause and the Commerce Clause should be reversed.

Respectfully submitted,

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(8) (6)

No. 86-71 & 86-97



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

CTS CORPORATION,

*Appellant,*

— vs. —

DYNAMICS CORPORATION OF AMERICA,

*Appellee.*

STATE OF INDIANA,

*Intervenor-Appellant,*

— vs. —

DYNAMICS CORPORATION OF AMERICA,

*Appellee.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

# BRIEF *AMICUS CURIAE* OF THE STATE OF NEW YORK IN SUPPORT OF APPELLANTS

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## INTEREST OF AMICUS CURIAE

*Amicus*, State of New York, by Robert Abrams, Attorney General of the State of New York, respectfully submits this brief in support of appellants pursuant to Supreme Court Rule 36.4. *Amicus* urges this Court to reverse the judgment of the court of appeals and to affirm the power of a state to enact legislation that adjusts the variety of interests effected by takeovers of local corporations.

New York has an interest in the issues presented by this appeal because this Court's decision may affect the validity of a recent amendment to the New York Business Corporation Law ("NYBCL"). The amendment, N.Y. BUS. CORP. LAW §912 (McKinney 1986), and the Indiana law challenged in this litigation, The Control Share Acquisitions Chapter of the Indiana Business Corporation Law, IND. CODE ANN. §§23-1-42-1 to 11 (Burns Cum. Supp. 1986), operate quite differently, but they advance common legitimate state interests. As *amicus*, New York seeks to protect those interests. New York emphasizes the power of states to enact legislation, consistent with *Edgar v. MITE Corp.*, 457 U.S. 624 (1982),[1] that apportions the local interests and rights affected by changes in corporate control and fundamental corporate events even though the legislation incidentally impacts on interstate commerce. The challenged Indiana act, Section 912 and numerous other state laws represent the best efforts of many states to exercise their traditional authority over such matters while complying with the limited guidelines articulated in *Edgar v. MITE, Corp.*

This Court's response to Indiana's attempt to prescribe rules governing the exercise of the voting rights associated with newly-acquired control shares may eventually guide lower courts' assessment of New York's statute. Like Indiana's law, Section 912 governs internal corporate matters; it does so by setting requirements for certain business combinations between New York

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[1] The State of New York also participated as amicus curiae in *Edgar v. MITE Corp.*, and supported the constitutionality of the Illinois law challenged there.

resident domestic corporations and certain shareholders of 20 percent or more of the outstanding voting stock ("interested shareholders") of resident domestic corporations. Authority to regulate the voting rights of shares and prescribe requirements for business combinations traditionally has resided with the state under whose laws the corporation is organized. For example, section 912 restricts interested shareholders' access to corporate assets by prescribing requirements for mergers, consolidations, dissolutions and other dispositions of significant corporate assets. Its goal is to promote the long-term well-being of New York resident domestic corporations.

The type of business combination affected by section 912 usually accompanies highly-leveraged unilateral takeovers. These combinations frequently change the financial structure, character, investment and employment policies, and earnings of the local corporation. Too often such changes are initiated in order to fund the takeover itself and operate to the long-term detriment of the corporation. These combinations may also alter the legal relationships and expectations among and between shareholders of the resident domestic corporation. Interests outside the corporation may also be significantly affected, particularly those of suppliers and employees of the corporation and other local businesses. Choosing from several approaches, 32 states have enacted statutes that protect and balance the variety of interests implicated by transactions conceived to force major internal corporate changes in corporations deeply rooted in those states.[2]

Lastly, the State of New York is the home of thousands of corporations and corporate investors of every variety. The New York and American Stock Exchanges are located in New York and are pillars of the State's economy. As the site of a staggering volume of transactions involving corporate securities, assets and control, the State's interest in the Court's decision is

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[2] Alaska, Arkansas, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia, and Wisconsin.

keen: the decision may impact on the economy of the State, how people do business within it, and the development of its commercial law.

In sum, the State of New York has an interest in protecting the power of states to enact statutes which, by constitutionally permissible means, adjust the variety of local interests affected by corporate takeovers. We believe that the Indiana statute satisfies the requirements of the Commerce and Supremacy clauses. Likewise, we are satisfied that the New York statute is fully compatible with the provisions of the United States Constitution, although we recognize that the Court's decision in this case is not an occasion – and should not be the occasion – to resolve this question.

## SUMMARY OF ARGUMENT

Acting pursuant to powers granted to it under the Supremacy and Commerce Clauses of the Constitution, Congress enacted the Williams Act, 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f)(1982), which brought a measure of protection to shareholders of corporations that were the targets of takeover efforts. In so doing, Congress did not evince an intention to preempt state statutes covering the same subject matter. It neither sought to impose a national governmental policy regarding corporate takeover contests nor to preclude the states from enacting laws that strike a different balance.

Recently, in *Edgar v. MITE Corp.* this Court considered the effect of the Williams Act on an Illinois statute which regulated certain takeover contests and declined to hold that the Williams Act preempts state regulation in this area or otherwise imposes an overriding national policy respecting takeovers. Nevertheless, the court of appeals devined the existence of such a policy and invalidated the Indiana statute which sought to regulate the exercise of voting rights in connection with takeovers of corporations having substantial contacts with that state. In so doing, the lower court cast grave doubt on the traditional power of a state to enact legislation that affects transactions designed to capture corporate control, alter corporate governance and

reallocate substantial assets of corporations firmly connected to that state. Its decision should be reversed.

Absent express preemption of state power by Congress, a federal law preempts only state laws that cannot be reconciled with it. The purpose and scope of the Williams Act are limited to protecting shareholders through full and fair disclosure of information pertinent to securities transactions. State laws that provide other benefits to shareholders, regulate local corporations, accord rights to their employees and aid the surrounding economies are not affected by the Williams Act. Rather than regulating the purchase and sale of securities, such laws usually operate to limit an individual's exercise of control over a corporation or his ability to reallocate significant corprate assets. Misconstruing the reach of the Williams Act, the courts below erroneously struck down the Indiana act even though the purposes and provisions of the two statutes do not conflict and could easily have been reconciled. Contrary to the holdings of the courts below, the Indiana act need not cause any delay that conflicts with the provisions of the Williams Act.

The Commerce Clause itself imposes restraints on the power of states to enact laws that directly burden interstate commerce or discriminate against it. This Court has consistently acknowledged the authority of the several states to implement nondiscriminatory laws that are intended to carry out legitimate state purposes.

The corporation is a creature of state law and regulation of the internal affairs of resident corporations is manifestly a legitimate state concern. In striking down the Indiana act on Commerce Clause grounds, the court of appeals accorded only lip service to Indiana's substantial concern in apportioning rights affected by changes in control and asset deployment of corporations that incorporate in Indiana and otherwise are strongly tied to the state. The interests of states in those internal corporate matters are legitimate and substantial, and if a state statute is drawn to further them it should withstand challenges based on the Commerce Clause.

Indiana's statute is constitutional because it only regulates post-acquisition voting rights for control share acquisitions. It does not directly regulate interstate transactions; nor does it discriminate against acquisitions commenced by out-of-state residents. Despite the holdings of the courts below, the extent of the Indiana statute's burden on interstate commerce is speculative. The record contains no evidence that the statute will adversely affect interstate commerce. On the other hand, the Indiana act benefits local shareholders by granting them a voice in proposed material changes in voting control, permitting them to consider a tender offer without fear of a shareholder stampede, and promoting fair treatment of non-tendering shareholders.

The Indiana act is only one of a variety of measures enacted by states that bear on the subject of corporate takeovers. The constitutionality of each such measure should be assessed individually given differences in the degree of local contact required, the particular state interest intended to be addressed and other factors. The court of appeals' decision appears to have a broad sweep. It draws into question any state law which a court may view as slowing "the important commerce of corporate control," *see Dynamics Corp. of America v. CTS Corp.*, 794 F.2d 250, 264 (7th Cir. 1986). This Court should reject the lower court's effort to override state laws and impose a national policy without the benefit of clear Congressional guidance.

## ARGUMENT

### I. The Preemption Holding Of The Courts Below Finds Little Support In The Williams Act Or *Edgar v. MITE Corp.*, And Unnecessarily Casts Doubt On State Laws That Do Not Conflict With The Williams Act

Absent explicit preemptive language in a federal statute, courts should not declare a state statute invalid under the Supremacy Clause, U.S. Const. art. VI, cl.2, unless the federal and state laws are irreconcilable. *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985); *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190 (1983); *see Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). The preemption analysis starts with the assumption that in fields traditionally occupied by the states, "the historic police powers of the States were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). *See City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 643 (1973) (Rehnquist, J., dissenting).

Aside from express preemptive language, the clear and manifest purpose of Congress to preempt all state law may be found where: the nature of the subject matter regulated permits no other conclusion, *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); a pervasive scheme of federal regulation leaves no room for supplementary state regulation, *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. at 633; "compliance with both federal and state regulations is a physical impossibility," *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. at 142-43; or state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Edgar v. MITE Corp.*, 457 U.S. at 631 quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

States have traditionally occupied the field of corporate law. *Burks v. Lasker*, 441 U.S. 471, 479-80 (1979). "Corporations are creatures of state law, and ... state law will govern the internal affairs of the corporation." *Cort v. Ash*, 422 U.S. 66, 84 (1975); *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 478-79 (1977). In this appeal, the presumption against preemption is entitled to great weight due to the absence of any contentions that the Williams Act contains express preemptive language, evinces an intent to occupy the entire field or that it would be impossible to comply with the provisions of the Williams Act and the significantly different provisions of the Indiana law. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 127 (1973). Here, as in *Edgar v. MITE Corp.*, the sole issue is whether the Indiana law frustrates the objectives of the Williams Act in "some substantial way." *Edgar v. MITE Corp.*, 457 U.S. at 632 (White, J.).

Resolution of this issue requires that operation of the challenged state law be measured against the purpose of the federal statute. The Williams Act, passed in 1968, sought to close the regulatory gap caused by the increased use of cash tender offers in corporate acquisitions, "a device that had 'removed a substantial number of corporate control contests from the reach of existing disclosure requirements of the federal securities law.' " *Edgar v. MITE Corp.*, 457 U.S. at 632, quoting *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 22 (1977). The Williams Act is primarily a full disclosure law which furnishes important information to all target shareholders, and provides certain protections to target shareholders who elect to tender their stock.[3]

[3] Under the Williams Act, disclosure is required of persons who acquire more than five percent of certain classes of securities or commence a tender offer which would give them ownership of more than five percent of certain classes of securities. 15 U.S.C. §§78m(d)(1), 78n(d)(1). The information that must be disclosed includes: the background and identity of the acquiror; the source of the funds to be used in making the purchase; the purpose of the purchase, including any plans to liquidate the company or make major changes in corporate structure; and the extent of the acquiror's holdings in the target

*(Footnote continued)*

When Congress amended the Securities Exchange Act of 1934 ("1934 Act"), 15 U.S.C. §§78a *et seq.* by enacting the Williams Act, the amendment did not disturb section 28(a) of the 1934 Act, 15 U.S.C. §78bb(a). In pertinent part, Section 28(a) provides as follows:

> Nothing in this title shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this title or the rules and regulations thereunder.

Section 28(a) clearly expresses Congress' intent to limit the preemptive effect of the federal securities laws. This intent is grafted onto the Williams Act. Thus, any inquiry into the preemptive effect of the Williams Act must be illuminated by the unmistakeable fact that section 28(a) is intended to "protect, rather than limit, state authority." *Leroy v. Great Western United Corp.* 443 U.S. 173, 182 (1979); *see Agency-Rent-A-Car, Inc. v. Connolly*, 686 F.2d 1029, 1038 (1st Cir. 1982).

The Indiana control share acquisitions law does not conflict with the Williams Act or frustrate its objectives in a substantial way. The statutes operate in related, but separate arenas. The Indiana law defines the post-acquisition voting rights of certain controlling shares while the sole purpose of the Williams Act is to provide investors with full and fair disclosure regarding tender offers. *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. at 35; *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58

*(Footnote continued)*

company. 15 U.S.C. §78m(d)(1). With respect to tender offers: (1) stockholders who tender their shares may withdraw them during the first 7 days of a tender offer and if the offeror has not yet purchased their shares, at any time after 60 days from the commencement of the offer, 15 U.S.C. §78n(d)(5); and (2) all shares tendered must be purchased for the same price; if an offering price is increased, those who have already tendered receive the benefit of the increase. 15 U.S.C. §78n(d)(7). *See Edgar v. MITE Corp.*, 457 U.S. at 632.

(1975); 113 Cong. Rec. 24664 (1967)(Comments of sponsor, Senator Williams); S. Rep. No. 550, 90th Cong., 1st Sess. (1967)(Senate Report). Moreover, the Indiana law protects a broader range of interests than those protected by the Williams Act, including local economic and social interests likely to be affected by transfers of corporate control. *See Edgar v. MITE Corp.*, 457 U.S. at 647 (Powell, J., concurring in part).

The court of appeals swept aside the Indiana law on the ground that it frustrated an objective of the Williams Act — the "delicate balance" struck between the tender offeror and incumbent management. *Dynamics Corp. of America v. CTS Corp.*, 794 F.2d 250, 262 (7th Cir. 1986). However, in *Piper v. Chris-Craft Industries, Inc.*, this Court stated:

> Congress was indeed committed to a policy of neutrality in contests of control, but its policy of evenhandedness does not go to either the purpose of the legislation or to whether a private cause of action is implicit in the statute. Neutrality, is, rather, but one characteristic of legislation directed toward a different purpose — the protection of investors.

430 U.S. at 29. Moreover, in *Edgar v. MITE Corp.*, Justice White's conclusion that the policy of neutrality underlying the Williams Act should be accorded preemptive effect failed to command a majority of this Court.[4] *See Edgar v. MITE Corp.*, 457 U.S. at 646 (Powell, J., concurring); *Id.* at 655 (Stevens, J., concurring). In brief, the decision to strike down the Indiana act was supported neither by this Court's case law nor the

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[4] Justice White's opinion has been accorded great weight by several courts of appeals, *Fleet Aerospace Corp. v. Holderman*, 796 F.2d 135 (6th Cir. 1986); *Securities and Exchange Commission v. Carter Hawley Hale Stores, Inc.*, 760 F.2d 945 (9th Cir. 1985); *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558 (6th Cir. 1982); *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122 (8th Cir. 1982), but none of the statutes reviewed by those courts was anologous to Indiana's law.

legislative history of the Williams Act. Tacitly conceding that it had found no clear and manifest intent of Congress to preempt state laws like the one challenged here, the court of appeals nevertheless took the required "big leap," and toppled the Indiana law. *Dynamics Corp. of America v. CTS Corp.*, 794 F.2d at 262.

The court of appeals' "delicate balance" analysis also casts doubt on a variety of other state statutes which *amicus* believes do not frustrate the full and fair disclosure purpose of the Williams Act or upset that act's policy of neutrality. Generally, these statutes protect interests far broader than those addressed in the Williams Act. These statutes reflect a variety of approaches. Control share acquisitions statutes, like that of Indiana, allow shareholders or their duly elected directors to determine voting rights for control share acquisitions. Business combination statutes generally require similar approval for business combinations, broadly defined to include a wide range of transactions involving substantial corporate assets.[5] Fair value statutes grant non-tendering minority shareholders the right to receive a statutorily prescribed fair price to protect them from being "freezed out" by the controlling shares.[6] Still other statutes combine features of each of the above laws.[7] The delicate balance reasoning adopted by the court of appeals implies that it would invalidate all of these statutes because they may make acquisition of control of a corporation or access to its assets more

[5] New York, N.Y. BUS. CORP. LAW §912 (McKinney 1986), New Jersey, 1986 N.J. Sess. Law Serv. Chap. 74 (West), and Kentucky, KY. REV. STAT. §271A.397 (1984) have enacted different versions of business combination statutes.

[6] Pennsylvania, PA. STAT. ANN. tit. 15, §1910 (Purdon Supp. 1986), has enacted a fair value statute.

[7] Hybrid statutes have been enacted by Wisconsin, WIS. STAT. §§180.25(9), 180.725 (1986); Maryland, MD. CORPS. & ASS'NS CODE ANN. §§3-601 *et seq.* (1985); Kentucky, KY. REV. STAT. §271A.397-99 (1984); Michigan, MICH. COMP. LAWS §§450.177 *et seq.* (Supp. 1986); and other states.

difficult to accomplish.[8] As demonstrated earlier, the Williams Act should not be construed to have such an intrusive impact on traditional state authority.

In sum, read in light of settled principles of federalism, section 28(a) of the 1934 Act, the legislative history of the Williams Act and the broad traditional role of the states in regulating corporations, no basis exists for concluding that Congress intended to preempt state laws pertaining to the exercise of voting rights, use of corporate assets, transfer of corporate control or treatment of minority interest shareholders. All of these transactions impact on internal corporate matters and implicate interests beyond those sought to be protected by the Williams Act.

In addition, no policy or objective of the Williams Act is frustrated by these state laws. Lower court decisions that find preemption appear to be based upon the mistaken belief that since interstate securities transactions are used to accomplish these major corporate changes, no state can enact legislation which affects these transactions. *Cf. Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978) (Court rejected the "novel suggestion that because the economic market for petroleum products is nationwide, no state has the power to regulate the retail marketing of gas.") But Congress has not addressed the impact of these major corporate changes, and until it does so, this Court should leave the states free to serve as laboratories for finding effective ways of regulating takeovers. Accordingly, thi.

[8] The business combinations regulated by Section 912, including mergers, consolidations, dissolutions and other reallocations of substantial corporate assets, have long been regulated by New York law in some fashion. Measuring section 912 against the Williams Act reveals that it *does not*: interfere with the disclosure requirements of the Williams Act; purport to regulate the purchase and sale of securities; impose time limits inconsistent with the Williams Act (§912(b)); effect voting rights; restrict the acquiror's ability to oust incumbent management; or permit a state official to usurp shareholders' decisions to sell their shares. The New York act only restricts the freedom of resident domestic corporations to execute a business combination that will redirect substantial corporate assets principally for the benefit of the newly-acquired controlling interest.

Court should hold that Indiana's control share acquisitions statute is not preempted by the Williams Act. *See Hillsborough County, Florida v. Automated Medical Laboratories, Inc.; Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission.*

**II. State Statutes, Like Indiana's, That Adjust The Various Interests Effected By Corporate Takeovers Are Constitutional For They Are Nondiscriminatory And Have Only Incidental Effects On Interstate Commerce**

The Commerce Clause provides that "Congress shall have Power... to regulate Commerce... among the several States." U.S. Const. art I, §8, cl. 3. While it is well settled that the dormant Commerce Clause is a limitation on the power of the states to affect interstate commerce, *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1852), it is also clear that states are not precluded from enforcing local laws that incidentally burden interstate commerce. *Lewis v. B.T. Investment Managers, Inc.*, 447 U.S. 27 (1980); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1961). Direct burdens on interstate commerce are prohibited, but the Commerce Clause permits states to implement laws which affect interstate commerce if the state interest is legitimate, and the state regulation is nondiscriminatory. *Brown-Forman Distillers Corp. v. New York State Liquor Authority ("NYSLA")*, 106 S. Ct. 2080 (1986); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

Minimal inquiry is required to recognize the constitutional infirmity in state statutes that directly regulate or discriminate against interstate commerce. *See, e.g., Brown-Forman Distillers Corp. v. NYSLA*, 106 S. Ct. at 2080; *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). In contrast, when a state statute has only indirect effects on interstate commerce and regulates evenhandedly, courts must examine whether the state's interest is legitimate and whether the burden on commerce is outweighed by the local benefits. *Brown-Forman Distillers*

*Corp. v. NYSLA*, 106 S. Ct. at 2080; *Edgar v. MITE Corp.*, 457 U.S. at 640; *Pike v. Bruce Church, Inc.*, 397 U.S. at 142. Where, as here, the challenged state statute furthers weighty, legitimate state interests it does not offend the constitution.

Citing *Edgar v. MITE Corp.*, the courts below held that Indiana's control share acquisitions statute violated the Commerce Clause. However, the majority opinion in *Edgar v. MITE Corp.* supports neither the holding nor reasoning of the courts below. First, the characteristics of the Indiana control share acquisitions statute bear no resemblance to the provisions of the Illinois Business Takeover Act which this Court invalidated.[9] Furthermore, the Court acknowledged the legitimacy of Illinois' interest in protecting local investors, but concluded that the means used unnecessarily burdened interstate commerce and did not plainly further the interests asserted by Illinois. *Id.* at 643-46. Ignoring the limited reach of this Court's holding in *Edgar v. MITE Corp.*, the courts below invalidated the Indiana law without giving proper weight to the legitimate interests of Indiana or the variety of benefits derived from its statute. In fact, the court of appeals went so far as to suggest that generally states have limited interests in regulating the effects of corporate takeovers. Of course, several weighty interests support state legislation that adjusts the variety of local interests likely to be directly effected by corporate takeovers. Note, *State Regulation of Tender Offers: Legislating Within The Constitutional Framework*, 54 Fordham L. Rev. 885, 901 (1986). Takeovers are designed to have a direct impact on the fundamental internal affairs of target corporations, specifically corporate control and the allocation of assets. For example, they implicate interests of employees, minority shareholders and incumbent management as well as businesses located in the area where the corporation does substantial business. Thus, while takeovers may be accomplished by interstate transactions, local interests traditionally regulated by the states are frequently impacted directly.

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[9] The Illinois act allowed the Illinois Secretary of State to block indefinitely a nationwide tender offer. The Indiana act, on the other hand, assigns no role to the state in takeover contests, and does not regulate the transfer of stock.

Corporations and corporate shares are creatures of state law. *Cort v. Ash*, 422 U.S. at 84. Despite increased trading of corporate shares in interstate and international commerce, shares remain items over which the states have significant authority. The initial features of corporate stock, including voting rights, were created by states, and states retain the authority to modify or amend those features. That authority includes the power to define the circumstances under which shares may be used to gain control over a corporation or to reallocate corporate assets. Thus, contrary to the court of appeals' belief, the federal government and states share a joint interest in the "commerce of corporate control." *Dynamics Corp. of America v. CTS Corp.*, 794 F.2d at 264.

Some of the specific goals states seek to achieve by enacting various forms of takeover legislation include: (1) protecting local non-tendering shareholders from the effects of two-tier "freeze-out" transactions; (2) permitting shareholders to participate in decisions regarding fundamental corporate events such as mergers, consolidations, and sales and pledges of assets; (3) encouraging certain types of investment strategies considered good for the economy of the state; and (4) eliminating the need for incumbent management to focus upon certain defensive strategies considered unhealthy for the state's economy. Each of these interests is important to the states and in assessing the validity of a state statute under the Commerce Clause, courts should accord these interests great weight.

The court of appeals' failure to accord proper weight to Indiana's stated interests renders its *Pike* analysis defective.[10] Unlike the statute considered in *Edgar v. MITE Corp.*, Indiana has a strong interest in the corporations covered by its control share acquisitions act. The Indiana act applies only to corporations organized under the laws of Indiana with 100 or more

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[10] Application of the *Pike* balancing test is appropriate because the Indiana act does not directly regulate interstate transactions. Instead, once the stock acquisition is completed, the statute allows shareholders to determine whether voting rights will be accorded to an acquiror of a controlling interest.

shareholders which have their principal place of business, principal offices or substantial assets within Indiana, and more than ten percent of their shares owned by Indiana residents. Thus, the Indiana act covers corporations that were incorporated in the state and in which Indiana residents have a substantial ownership interest and which do substantial business in the state or maintain substantial assets there.

These firm ties between the covered corporations and Indiana permit the state to pursue several permissible objectives: protecting resident shareholders and local economies, and regulating internal corporate affairs. Sargent, *Do The Second Generation State Takeover Statutes Violate The Commerce Clause?*, 8 Corp. L. Rev. 3 (1985). Because the Indiana law is directed at local matters, its effect on interstate commerce is incidental and its burden on interstate commerce is modest. Additionally, the Indiana law regulates evenhandedly inasmuch as it makes no distinction between acquisitions initiated by out-of-state residents and those initiated by state residents.

The Indiana law advances the legitimate state interests identified. It benefits Indiana shareholders because it only applies to Indiana corporations in which Indiana residents have a substantial ownership interest. It protects shareholders by permitting a majority of disinterested shareholders to determine whether a material change in voting control is in their best interests. Because it requires express shareholder approval of a transfer of controlling voting rights in a corporation, the statute allows resident shareholders to discount the possibility of a shareholder stampede and permits them to focus on factors, including the probable local economic and social impact of a takeover, which they might not otherwise evaluate.

The Indiana act also advances the state's interest in regulating the internal affairs of corporations organized under the laws of Indiana. The statute is drawn to further this interest. It applies to voting rights, manifestly an internal matter, of corporations organized under the laws of Indiana. *APL Limited Partnership v. Van Dusen Air, Inc.*, 622 F. Supp. 1216, 1223 (D.C.

Minn. 1985). It does not apply to foreign corporations as did the statute examined in *Edgar v. MITE Corp.*

We are especially troubled by the aspect of the court of appeals' opinion that suggests that the Commerce Clause condemns state statutes that require shareholder or board of director approval of fundamental internal corporate changes initiated through interstate stock transactions. This notion implicates statutes like the one enacted by New York even though they plainly advance legitimate state interests without excessively burdening interstate commerce.

In this regard, Section 912, furthers several legitimate state interests. As a threshhold matter, the "resident domestic corporations" covered by section 912 are closely connected to New York so as to achieve the State's permissible purposes.[11] Secondly, Section 912 furthers several important state objectives, chief among them is promoting the long-term well-being of New York resident domestic corporations. *See* Governor's Program Memorandum, 1985 N.Y. Laws Chap. 915. The New York law accomplishes this goal by forbidding resident domestic corporations from engaging in business combinations with an interested shareholder for five years unless the business combination or controlling share acquisition was approved by the board of directors prior to the interested shareholder's stock acquisition date. Section §912(b). Five or more years after the interested shareholder's stock acquisition date, the resident domestic corporation may engage in a business combination with the interested shareholder if it obtains the affirmative vote of the holders of a majority of the outstanding stock not beneficially owned by such interested shareholder or pays the shareholders, other than the interested shareholder, a statutorily prescribed formula price designed to ensure that all holders of shares of

[11] The jurisdictional predicate required to trigger Section 912 is more strict than under Indiana law. Section 912 only covers corporations organized under the laws of New York *and* which have (1) their principal offices *and* (2) significant business operations *and* (3) at least 10 percent of the ownership of its voting stock located in New York. NYBCL §912(a)(13).

voting stock will receive at least the highest price per share paid by the interested shareholder, determined as of the date such business combination was first proposed in its final, definitive form. NYBCL §912(c).[12]

Thus, section 912 has the following effects: (1) it encourages takeovers that the acquiror and target management agree are in the best interests of New York corporations, their employees and shareholders; (2) it discourages unilateral takeovers which depend on immediate access to significant assets of the corporation; (3) it encourages long-term investment commitment by interested shareholders who acquired their controlling interest without the approval of the board of directors; and (4) it protects resident non-tendering shareholders from "freeze-out" transactions.[13] Achieving each of these benefits is important to the economic and social well-being of New York.

On the other side of the scale, section 912 does not excessively burden interstate commerce. It has a limited impact on the interstate commerce of corporate stock and control. In contrast to the statutes struck down in *Edgar v. MITE Corp.*, and by various other federal courts, section 912 does *not*: (1) regulate the sale of shares; (2) protect incumbent management from replacement by an interested shareholder; (3) limit the voting rights of newly-acquired shares; (4) require approval of the acquisition of controlling interests; (5) prohibit a change of the corporation's line of business; (6) grant the State a role in determining whether an interstate acquisition will proceed; or (7) deprive shareholders of the right to sell their shares at a premium.

[12] A related provision of New York law, NYBCL §513, restricts the use of "greenmail" by resident domestic corporations by requiring board of director and shareholder approval of such purchase or agreement to purchase.

[13] Two corollary benefits are discouraging excessive corporate debt and encouraging long-term interests, especially research and development and business diversification.

The court of appeals' opinion nonetheless calls statutes like Section 912 into question apparently on the ground that the Commerce Clause bars states from sanctioning any activity that slows "the important commerce in corporate control." *Dynamics Corp. of America v. CTS Corp.*, 794 F.2d at 264. Implicit in the court's opinion is its belief that tender offers benefit shareholders and, therefore, the Commerce Clause should protect tender offers. In other words, under the guise of a Commerce Clause analysis, the court of appeals imposed its economic judgment regarding the value of tender offers. Such economic policy judgments, however, are reserved for the Congress or state legislatures. In the absence of a national policy regarding corporate takeovers, it is not appropriate for federal courts to attempt to fill the void by judicial interpretations of the Commerce Clause. This is especially so in light of Congress' disinclination, to date, to formulate an approach to the issue and the disputed economic data regarding the value of takeovers, particularly highly-leveraged hostile ones. Coffee, *Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer's Role In Corporate Governance*, 84 Col. L. Rev. 1145 (1984); *see* Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 Wisc. L. Rev. 125, 156; Lipton, *Takeover Bids in the Target's Board Room*, 35 Bus. Law. 101 (1979).

## CONCLUSION

For all the foregoing reasons, the decision below should be reversed.

Dated: New York, New York
December 4, 1986

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Nos. 86-71 & 86-97

IN THE

# Supreme Court of the United States

October Term, 1986

CTS CORPORATION,
*Appellant,*
v.
DYNAMICS CORPORATION OF AMERICA,
*Appellee.*

STATE OF INDIANA,
*Intervenor-Appellant,*
v.
DYNAMICS CORPORATION OF AMERICA,
*Appellee.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

# AMICUS CURIAE BRIEF OF STATE OF MINNESOTA

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IN THE

# Supreme Court of the United States

October Term, 1986

Nos. 86-71 & 86-97

CTS CORPORATION,
*Appellant,*
v.
DYNAMICS CORPORATION OF AMERICA,
*Appellee.*

STATE OF INDIANA,
*Intervenor-Appellant,*
v.
DYNAMICS CORPORATION OF AMERICA,
*Appellee.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## AMICUS CURIAE BRIEF OF STATE OF MINNESOTA

## INTEREST OF AMICUS CURIAE

*Amicus Curiae* State of Minnesota, through its Attorney General Hubert H. Humphrey, III (hereinafter "Minnesota"), respectfully submits this brief in support of the appellants. Resolution of the issues involved in this appeal will have a profound impact on Minnesota for two principal reasons.

First, this case raises a significant question regarding a state's authority to regulate the internal affairs of domestic corporations. The states' historical and longstanding authority to enact business corporation laws, without regard to the residency of the corporation's shareholders, has been severely undermined by the decision now under review by the Court. Consequently, Minnesota and its body of corporate laws,[1] which apply to corporations by reason of their incorporation in Minnesota without shareholder residency requirements, can be tremendously affected by the decision in this case.

Second, Minnesota has promulgated its own Control Share Acquisition Act (hereinafter "MCSAA").[2] It was enacted by the Minnesota Legislature in 1984 as part of an extensive modification of Minnesota's corporate takeover statutes, with an express purpose of conforming Minnesota law to this Court's decision in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982).[3] The 1984 Minnesota corporate takeover legislation is comprised of two different parts: (a) a major revision of Minn. Stat. ch. 80B ("Chapter 80B"), the state securities law which regulates the registration of tender offers, and (b) the MCSAA, which consists of amendments to Minn. Stat. ch. 302A, the Minnesota Business Corporation Act, and requires shareholder approval of "control share acquisitions," includ-

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[1] Minn. Stat. ch. 302A (1984), as amended.

[2] Minn. Stat. § 302A.671 (Supp. 1985) as amended by Act of March 24, 1986, ch. 431, §§ 2 and 21, 1986 Minn. Laws 703, 706; the proxy provision relating thereto, Minn. Stat. § 302A.449, subd. 7 (Supp. 1985) as amended by Act of March 24, 1986, ch. 431, § 1, 1986 Minn. Laws 703; and the relevant definitional provisions, Minn. Stat. § 302A.011, subds. 37-41 (1984 & Supp. 1985). These statutory provisions are contained in the Appendix to this brief.

[3] Act of April 25, 1984, ch. 488, § 1, subd. 2(4), 1984 Minn. Laws 471.

ing those effected through tender offers.[4] The MCSAA was amended in both the 1985 and 1986 Minnesota legislative sessions.[5]

In November, 1984, the Eighth Circuit Court of Appeals concluded that Chapter 80B is constitutional. *Cardiff Acquisitions, Inc. v. Hatch*, 751 F.2d 906 (8th Cir. 1984). However, just recently, the Minnesota United States District Court determined that the MCSAA was unconstitutional as violating the Commerce and Supremacy Clauses of the United States Constitution, and that decision is now on appeal to the Eighth Circuit Court of Appeals. *Gelco Corp. v. Coniston Partners*, Civ. No. 3-86-847 (D. Minn. filed Nov. 7 and 10, 1986), *appeal docketed*, No. 86-5418 (8th Cir. filed Nov. 10, 1986).[6]

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[4] Act of April 25, 1984, ch. 488, 1984 Minn. Laws 470.

[5] Act of June 24, 1985, 1st Spec. Sess. ch. 5, 1985 Minn. Laws 1630, and Act of March 24, 1986, ch. 431, §§ 1, 2 and 21, 1986 Minn. Laws 703, 706.

[6] The constitutionality of the MCSAA has been the subject of two prior cases. In *Edudata Corp. v. Scientific Computers, Inc.*, 599 Supp. 1084 (D. Minn.), *appeal dismissed*, 746 F.2d 429, 430 (8th Cir. 1984), the court denied an acquiring person's motion for a temporary restraining order with respect to enforcement of the Minnesota legislation. 599 F. Supp. at 1086, 1088. Thereafter, the case was settled by the offering and target companies and thus no final decision was rendered by the court. A further challenge in *APL Limited Partnership v. Van Dusen Air, Inc.*, 622 F. Supp. 1216 (D. Minn. 1985), *vacated*, Civil No. 4-85-932 (Dec. 18, 1985), resulted in a decision that the MCSAA, as amended by the 1985 Minnesota Legislature, violated the Commerce Clause of the United States Constitution. *Id.* at 1220-25. This decision was appealed to the Eighth Circuit Court of Appeals, which heard the appeal on an expedited basis but ultimately was forced to dismiss the appeal as moot when the offeror and target company settled. Order, Nos. 85-5285, 85-5286 (8th Cir., Jan. 7, 1986). However, prior to dismissing the appeal, the Eighth Circuit directed the district court to vacate its decision and refused to actually dismiss the appeal or dissolve the stays pending appeal until it received the district court vacation order. Order, Nos. 85-5285, 85-5286 (8th Cir., Nov. 26, 1985).

The MCSAA is substantially similar to, but in some material respects different from, the Indiana Control Share Acquisition Act (hereinafter "ICSAA") under review in this case. The most significant difference between the two laws is that the shareholder vote under the MCSAA must be completed within twenty (20) business days of the target company's receipt of the required information,[7] which coincides precisely with the minimum offering period under the Williams Act,[8] whereas the corresponding provision under the ICSAA is fifty (50) calendar days.[9] Although some differences exist between the MCSAA and ICSAA, resolution of the instant appeal will likely impact the constitutionality of the MCSAA.

For the reasons expressed herein, Minnesota has a distinct, concrete and substantial interest in this appeal.

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[7] Act of March 24, 1986, ch. 431, § 2, 1986 Minn. Laws 703.

[8] 17 C.F.R. § 240.14e-1 (1986).

[9] Ind. Code Ann. § 23-1-42-7 (Burns Cum. Supp. 1986). Other differences between the Indiana and Minnesota laws include: (1) the ICSAA requires shareholder approval to determine whether the acquiring person may have voting rights, Ind. Code Ann. § 23-1-42-9 (Burns Cum. Supp. 1986), and the MCSAA provides for shareholder approval prior to consummation of the control share acquisition, Minn. Stat. § 302A.671, subd. 4 (Supp. 1985); (2) shareholder approval under the ICSAA requires a majority of "disinterested" shareholders, Ind. Code Ann. § 23-1-42-9 (Burns Cum. Supp. 1986) while the MCSAA provides for the majority vote of all shareholders, Minn. Stat. § 302A.671, subd. 4(a)(1) (Supp. 1985); and (3) the ICSAA requires the acquiring person to pay the expenses of the shareholder vote, Ind. Code Ann. § 23-1-42-7 (Burns Cum. Supp. 1986), whereas there is no such provision in the MCSAA.

## SUMMARY OF ARGUMENT

The court of appeals decision is inconsistent with well-recognized principles relating to the states' authority to enact corporate laws. In accordance with the states' power to adopt business corporation statutes, control share acquisition laws, like the ICSAA and MCSAA, are valid and constitutional enactments. They neither violate the Commerce Clause nor the Supremacy Clause of the United States Constitution.

As to the Commerce Clause assertions, control share acquisition legislation does not directly burden interstate commerce because these business corporation statutes apply only when the target company is incorporated under the law of the regulating state. The presence of this long-accepted nexus for state corporate law regulation—state of incorporation—dispels any claims that control share acquisition legislation is *per se* invalid as a direct burden on interstate commerce.

In addition, any indirect burdens occasioned by control share acquisition laws do not clearly exceed the benefits underlying the statutes. The state benefits are substantial in extending the doctrine of shareholder democracy to a target company's shareholders, thereby allowing shareholders to decide the destiny of their company; mitigating the coercive nature of control share acquisitions; inhibiting the abusive use of takeover tactics by both target and offering companies; and enhancing a state's business environment. In relation to these benefits, the legislation imposes an insubstantial burden on interstate commerce which is identical to the burden imposed by reason of a shareholder vote on a merger proposal. Of course, mergers have historically and constitutionally been subject to the shareholder approval process.

The Supremacy Clause claims are similarly without merit. The control share acquisition statutes are consistent with the

Williams Act in that the objective of the laws, shareholder protection, is identical; time frames for the shareholder vote under the ICSAA, and certainly under control share acquisition laws like the MCSAA, do not conflict with the timing provisions of the Williams Act; and the state legislation is not contrary to the Williams Act regulation of non-tender offer control share acquisitions.

The decision of the court of appeals should be reversed.

## ARGUMENT

### I. CONTROL SHARE ACQUISITION LEGISLATION, LIKE THE ICSAA AND MCSAA, DOES NOT VIOLATE THE COMMERCE CLAUSE.

#### A. Background.

Control share acquisition legislation, such as the ICSAA and MCSAA, was adopted pursuant to the states' longstanding and unquestioned authority to regulate the internal affairs of businesses incorporated within their respective jurisdictions. *See, e.g., Burks v. Lasker,* 441 U.S. 471, 478 (1979); *Cort v. Ash,* 422 U.S. 66, 84 (1975); *Ashley v. Ryan,* 153 U.S. 436, 446 (1894). In accordance with this historical power, state corporate laws have traditionally governed a multitude of matters affecting domestic companies and their shareholders. For example, state corporate laws have always provided various rights and protections to domestic company shareholders, whether or not the shareholders reside in that particular state,[10] including procedures for shareholders collectively to

[10] *See, e.g.,* Minn. Stat. §§ 302A.405 (1984) (consideration for shares); 302A.413 (1984) (preemptive rights); 302A.467 (1984) (shareholder remedies); 302A.471 (1984) (rights of dissenting shareholders).

decide matters which have a major impact on the corporation.[11]

As a rational extension of existing corporate law, the control share acquisition provisions afford to shareholders a valuable right in the form of an opportunity to determine as a group whether they desire a change in control of their corporation—a change that can have a dramatic impact on the company. In providing this statutory right, the state legislatures have granted shareholders of their domestic corporations the same kind of voting control that those shareholders have traditionally exercised over other forms of transactions which can also have a substantial impact on a domestic corporation, *i.e.*, mergers, exchanges of shares, and the sale of all or substantially all of the corporation's assets. *See, e.g.*, Minn. Stat. §§ 302A.601-302A.661 (1984).

The ICSAA, and similar laws like the MCSAA, constitutes a unique, innovative and proper approach in furthering the fundamental concept of shareholder democracy. This form of legislation has been the subject of scholarly comment which concludes that the legislation is constitutional.[12]

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[11] *See, e.g.*, Minn. Stat. §§ 302A.601 - 302A.661 (1984) (shareholder approval of mergers, exchanges of shares, and the sale of all or substantially all of the company's assets).

[12] *See* Johnson, *Minnesota's Control Share Acquisition Statute and the Need for New Judicial Analysis of State Takeover Legislation*, 12 Wm. Mitchell L. Rev. 183 (1986); Profusek and Gompf, *State Takeover Legislation After MITE: Standing Pat, Blue Sky, or Corporation Law Concepts*, 7 Corp. L. Rev. 3, 27-41 (1984); Note, *Has Ohio Avoided the Wake of MITE? An Analysis of the Constitutionality of the Ohio Control Share Acquisition Act*, 46 Ohio State L.J. 203 (1985).

## B. Control Share Acquisition Statutes, Such As The ICSAA And MCSAA, Do Not Offend The Commerce Clause Because They Neither Directly Regulate Nor Impose Clearly Excessive Burdens On Interstate Commerce.

The Commerce Clause prohibits an individual state from directly regulating or imposing clearly excessive burdens on interstate commerce. A state statute must therefore be upheld if it only indirectly impacts interstate commerce and any such burden is reasonable in relation to the local benefits derived from the state legislation. *Edgar v. MITE Corp.*, 457 U.S. 624, 640 (1982).; *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960). The control share acquisition statutes are constitutional because their impact on interstate commerce is indirect, as well as insignificant, in comparison to the local benefits derived from the laws.

### 1. The Control Share Acquisition Legislation Does Not Impose A Direct Burden On Interstate Commerce.

By their very terms, control share acquisition laws, like the ICSAA and MCSAA, do not directly burden interstate commerce. The legislation only applies to control share acquisitions in a domestic corporation which has certain additional connections with the state of incorporation.[13] As a result, the

[13] The ICSAA applies to a control share acquisition in an Indiana company having its principal place of business, principal office or substantial assets in Indiana, and which has a certain level of its outstanding shares owned by Indiana residents, *e.g.*, 10 percent. Ind. Code Ann. § 23-1-42-4 (Burns Cum. Supp. 1986). The MCSAA applies to an offer to acquire shares in a Minnesota corporation which has its principal place of business, or assets greater than $1,000,000, located in Minnesota. Minn. Stat. § 302A.011, subd. 8 (Supp. 1985).

scope of these business corporation statutes is limited to companies created under the law of the regulating state and having a further nexus with that state. The control share acquisition legislation, which is part of the states' respective corporate laws, therefore does not directly impact on interstate commerce.

A contrary conclusion would effectively invalidate all state corporation laws because, as indicated above, the critical basis for such laws is that the regulating state is the state of incorporation. If this nexus, in and of itself, was insufficient to establish the indirect nature of the state regulation on interstate commerce, the longstanding authority of the states to adopt business corporation statutes would be emasculated.

Indeed, many business transactions routinely regulated by state corporate laws involve factual circumstances where the only nexus to the regulating state is that the subject company is incorporated in that state. For example, a merger proposed by a New York company with a Minnesota corporation is subject to a vote of shareholders pursuant to the Minnesota Business Corporation Act, even though *no shareholders* of the Minnesota company reside in Minnesota. *See* Minn. Stat. § 302A.613 (1984). Likewise, a voting trust between New York and Alaskan residents is unquestionably subject to Minnesota law if the stock involved is issued by a Minnesota company. *See* Minn. Stat. § 302A.453 (1984).

A multitude of similar examples can be cited where state business corporation laws properly regulate the activities of people and entities not residing in the regulating state, based upon the sole fact that the involved company is incorporated in the regulating state. Clearly, no other nexus with the regulating state is required—just the state of incorporation is sufficient to allow a state to legislate under its business corporation statutes.

The opinion in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) does not provide otherwise. The *MITE* decision involved an Illinois securities tender offer registration law, not a business corporation statute. A plurality of the Court found the legislation to constitute a direct burden on interstate commerce because it regulated beyond the permissible scope of state securities laws. The Illinois law attempted to require the registration of a tender offer for securities even though no shareholder of the target company resided in Illinois. As such, the traditional and long-accepted nexus for regulation of securities matters, *i.e.*, shareholder residency, as established in the case of *Hall v. Geiger-Jones*, 242 U.S. 539 (1917),[14] was not present in the Illinois law. Accordingly, the plurality opinion noted that if other states imposed laws like the Illinois legislation, a tender offer could be subject to the securities statutes of many different states. 457 U.S. at 642.

Contrary to the Illinois securities statute involved in *MITE*, as discussed previously, control share acquisition statutes, like the ICSAA and MCSAA, are a part of the respective state's business corporation laws and therefore contain a proper jurisdictional nexus based on the target company's state of incorporation. Further, in stark contrast to the concern expressed in the *MITE* plurality decision on direct regulation, since companies have only one state of incorporation, there is no danger that a multiplicity of state corporate laws will apply to a particular control share acquisition.

Thus, just like other state corporation law provisions, control share acquisition legislation, such as the ICSAA and MCSAA, does not directly regulate or burden interstate commerce.

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[14] The *Hall v. Geiger-Jones* decision was actually quoted and relied upon by the *MITE* direct burden plurality. 457 U.S. at 641.

### 2. The Control Share Acquisition Provisions Do Not Impose Clearly Excessive Burdens On Interstate Commerce.

Any indirect impact of the control share acquisition statutes on interstate commerce does not impose clearly excessive burdens in relation to the local purposes served by the state legislation. The real, concrete and substantial benefits underlying the laws far exceed any actual or speculative burden imposed by the legislation on interstate commerce.

#### a. The local benefits underlying the control share acquisition laws are real, concrete and substantial.

The control share acquisition legislation furthers several important local benefits. First, and most significant, in accordance with the historical concept of shareholder democracy, the state laws protect shareholders of domestic corporations by affording them the right to control the destiny of their company. Second, the legislation mitigates the coercive nature of control share acquisitions. Third, the statutes inhibit the abusive use of takeover tactics, thereby furthering shareholder rights. Fourth, the state enactments enhance the regulating state's business climate which, in turn, encourages businesses to incorporate in that state and shareholders to invest in businesses incorporated in that state.

##### i. Pursuant to the historical concept of shareholder democracy, the state laws protect domestic company shareholders by affording them the right to control the destiny of their company.

A transaction which results in a change in control of a corporation may have a dramatic effect upon that corporation, an effect which can certainly be as substantial as a mer-

ger or other form of extraordinary corporate transaction. The control share acquisition laws merely extend to the shareholders of the regulating state's corporations the same right already enjoyed in the merger context, *i.e.*, to vote on transactions which may materially affect their company. This right of collective shareholder approval, which is grounded in the fundamental concept of shareholder democracy, furthers important local benefits by providing shareholders of domestic corporations the opportunity to control the destiny of their company.

Just like a merger, a change in control can unquestionably impact the future course and direction of a company. Indeed, if an acquiring person effects a control share acquisition it will direct the operations of the company, even though it may have no expertise in the company's areas of operation. Furthermore, as in many takeover cases, the acquiring person could then merge with the target, drain the company of its cash, and perhaps sell off assets of the resulting company.

The target company shareholders could, of course, for a number of different reasons, have a substantial and legitimate interest in seeing that their company is not so changed. For example, regardless of the offering price, shareholders may believe that the target company's potential, if its operations continue unchanged, far exceeds that price. Therefore, shareholders may well prefer to allow the company to continue in its present method and manner of operation so that the full economic potential of the company can be realized.

Notwithstanding the foregoing, it is claimed that a state does not have a legitimate interest in extending benefits to shareholders of a domestic company if those shareholders do not reside in the regulating state. Language from *Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982), is relied upon in sup-

port of this contention. Again, the *MITE* decision is inapposite.

As thoroughly discussed above, *MITE* pertained to state tender offer *securities* legislation which conferred protection on investors outside the regulating state, thereby exceeding the legitimate scope of a state securities disclosure statute. In contrast, the legislation under review in this case relates to the states' longstanding authority to regulate *domestic corporations* and thereby properly provides protection to all domestic company shareholders, no matter where they may reside. Certainly, the very purpose of domestic corporation statutes is to protect all of the company's shareholders. *E.g., Wooster Republican Printing Co. v. Channel 17, Inc.*, 533 F. Supp. 601, 617 (W.D. Mo. 1981), *aff'd*, 682 F.2d 165 (8th Cir. 1982) (state corporate law "designed primarily for the purpose of protecting the interests of shareholders of the corporation"). *See also Western Land Corp. v. Crawford-Merz Co.*, 62 F.R.D. 550, 555 (D. Minn. 1973). As far as domestic corporation laws are concerned, the shareholders' states of residency are immaterial.

A different result would seriously undermine the states' previous longstanding and unquestioned authority to regulate domestic corporations. The multitude of shareholder protection provisions contained in state corporation statutes do not distinguish between domestic company shareholders who reside in the regulating state and those who reside elsewhere. For example, all domestic company shareholders can vote on a merger proposal, irrespective of their state of residency. State corporate laws apply even where not a single shareholder of the domestic company resides in the regulating state. *See, e.g.*, Minn. Stat. § 302A.613, subd. 2 (1984) (provides that all shareholders can vote on a proposed merger, without any

stated residency requirement). Clearly, the states' regulation of domestic corporations legitimately and properly benefits all domestic company shareholders, no matter where they reside.

It is also asserted that a change in control does not impact the internal affairs of a company. The basis for this contention is found in language from the *MITE* opinion which states that "[t]ender offers contemplate transfers of stock by shareholders to a third party and *do not themselves* implicate the internal affairs of the target company." 457 U.S. at 645 (emphasis added).

Reliance on this statement from *MITE* is misplaced The state tender offer securities statute involved in *MITE* dealt with the process by which tender offers are made. The tender offer process quite clearly does not implicate the internal affairs of a company. Equally apparent, however, is the fact that control share acquisition provisions, like the ICSAA and MCSAA, do not regulate the tender offer process. Rather, these laws apply to the actual purchase of shares *following* a tender offer which would result in the acquiring person obtaining control in a domestic company. While tender offers *in and of themselves* do not affect the internal affairs of the subject corporation, a change in control clearly does implicate the internal affairs of the target company, as a typical takeover case so clearly demonstrates.

Once an acquiring person obtains control of a target company it will direct the operations of the company, even though the acquiring person may have no experience or expertise in the target's areas of operation. Further, with its acquisition of control, the acquiring person will have virtually unfettered discretion in how it changes the scope and structure of the target's business. This power, obtained upon acquisition of

control, clearly impacts on the future course and direction, let alone the very existence of the company. A corporation's internal affairs are most certainly implicated upon the consummation of a control share acquisition.

Nevertheless, it has been suggested that the internal affairs of a corporation are implicated only once the acquiring person votes its control block of stock, not at the time it consummates the control share acquisition.[15] This distinction elevates form over substance. Once control is obtained, the outcome of a shareholder vote is a foregone conclusion. In effect, the acquiring person controls the outcome of any shareholder vote and imposes its will on any minority shareholders. In the control share acquisition context, the concept of shareholder democracy can only be effectuated *before* acquisition of the controlling interest.

Finally, the contention that shareholder approval of a control share acquisition is not analogous to a shareholder vote on a merger transaction is without substance. It is apparent that for all practical purposes the transactions have an identical impact on the corporation. Without question, both mergers and control share acquisitions can have a profound effect on the future course and direction of the company.

In fact, the analogy between merger approval and control share acquisition approval is again made perfectly clear by the facts of a typical takeover case. It is common for an acquiring person to merge with the target without any mean-

[15] Although the ICSAA does not actually require shareholder approval prior to the control share acquisition, the practical effect of the Indiana statute may be just that. *See Dynamics Corp. of America v. CTS Corp.*, 794 F.2d 250, 261 (7th Cir. 1986). The MCSAA, of course, expressly requires shareholder approval prior to the consummation of a control share acquisition. Minn. Stat. § 302A.671, subd. 4 (Supp. 1985).

ingful vote by the target's shareholders. The first part, or front-end, of an acquiring person's plan is to gain control of the target through its tender offer. Upon obtaining control, the acquiring person will effect the second part, or back-end, of its plan, by the merger.[16] The outcome of the shareholder vote on the merger is a foregone conclusion due to the acquiring person's prior acquisition of control. As a result, the shareholders of the target will not have an opportunity to cast a vote, or at least a meaningful vote, as to whether the target and the acquiring person should be merged. Control share acquisition provisions, like the ICSAA and MCSAA, essentially fill this gap in the law.

**ii. The state laws mitigate the coercive nature of control share acquisitions.**

A control share acquisition confronts each shareholder, usually on short notice, with a "take it or leave it" proposition. In such an environment, an individual shareholder's decision to sell his or her stock does not necessarily amount to a vote in favor of the terms of the control share acquisition, nor does it mean that the shareholder would not prefer to remain as a shareholder of the existing company. To the contrary, individual shareholders, not knowing the position of other shareholders with respect to the proposed control share acquisition, may well sell their stock even though they oppose a change in control, because they fear that the proposed acquisition will succeed to the detriment of their company. Lacking the opportunity to decide on a collective basis whether the proposed acquisition is desirable, individual shareholders may be coerced

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[16] *See, e.g., Dynamics Corp. of America v. CTS Corp.*, 794 F.2d 250, 255 (7th Cir. 1986); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 956 (Del. 1985).

into selling or tendering their shares when they would prefer to retain them.

A phenomenon commonly referred to as a "squeeze"[17] contributes further to this coercive environment. If a shareholder fails to sell his stock prior to the actual consummation of a control share acquisition, he will then be subject to a back-end merger whereby the acquiring person dictates the cash-out price. This cash-out price may be well below what the shareholder would have obtained by selling or tendering his shares prior to the consummation of the control share acquisition. Again, although a shareholder may prefer to retain his stock in the company, without knowing the position of other shareholders regarding the proposed acquisition, an individual shareholder can be squeezed into selling his or her stock.

The control share acquisition laws provide important, concrete and substantial local benefits[18] by mitigating the coer-

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[17] *See, e.g., Dynamics Corp. of America v. CTS Corp.*, 794 F.2d 250, 255 (7th Cir. 1986).

[18] The benefits underlying the state legislation are not undermined due to the fact that a self-tender, a tender offer by the issuing company, is not subject to the state law. Control share acquisition laws do not apply to self-tenders for the obvious reason that, as a matter of definition, a self-tender does not change the ownership interest of the acquiring person, the issuing company. Certainly, the issuing corporation does not have a control interest in itself, and thus a self-tender, with its necessary increase of treasury stock, does not change the issuer's "control" of itself.

Further, state corporate law has traditionally recognized the right of a domestic corporation to repurchase its own shares. *See, e.g.*, Minn. Stat. § 302A.553 (1984). The directors must, of course, in repurchasing the company's stock, comport themselves in accordance with the fiduciary obligations owed to the shareholders. *See, e.g.*, Minn. Stat. § 302A.251, subd. 1 (1984). In contrast, a tender offeror seeking control owes no fiduciary obligations to shareholders.

It is apparent that the exclusion of self-tenders from the scope of control share acquisition laws is rationally based.

cive environment incidental to control share acquisitions. These benefits are effectuated by allowing shareholders of domestic corporations to collectively approve or disapprove the proposed acquisition. This process, based on the historical concept of shareholder democracy, provides domestic company shareholders the right to act in an informed, reasoned and non-coercive environment in deciding the fate of their company.

**iii. The state statutes further the interests of shareholders by inhibiting the abusive use of takeover tactics by both offerors and target companies.**

Control share acquisition statutes will have a beneficial impact by inhibiting the abusive use of takeover tactics by both offering and target companies. For example, a "poison pill"[19] is adopted and implemented by target company management without a shareholder vote, but in the professed best interest of shareholders.[20] Such defensive tactics, especially when used abusively, are almost always the subject of litigation which is usually considered by the courts on an expedited basis.[21] This litigation, in turn, places a tremendous burden on the courts and incredible expenses on the litigants, which expenses adversely affect target company shareholders. As a result, the courts are forced into the middle of these complex takeover battles and, instead of the shareholders, are effectively decid-

[19] The term "poison pill," as defined by the court of appeals, "refers to a family of shareholder rights agreements which, upon some triggering event such as the acquisition by a tender offeror of a certain percentage of the target corporation's common stock, entitle the remaining shareholders to receive additional shares of common stock (or other securities) at bargain prices." 794 F.2d at 254-55.

[20] *See, e.g., id.* at 255-56.

[21] *See, e.g., id.* at 251.

ing the eventual outcome of the takeover contest. Even more important, defensive measures of target companies oftentimes preclude the company's shareholders from considering an offer, even though a majority of the shareholders would find the offer attractive.

Control share acquisition legislation will, to a significant extent, remove the takeover battles from the courtroom and place the matter squarely before the most interested and affected parties, the shareholders. Certainly, target company management cannot as easily claim that "poison pills," or other defensive measures, are in the best interest of shareholders when a mechanism is readily available to enable the company's shareholders to vote on a proposed control share acquisition and thereby directly resolve the question for themselves. The mere presence of control share acquisition laws can therefore discourage the abusive use of defensive tactics by management.

The state legislation can actually be used affirmatively by offerors to bring the question of a control share acquisition directly to the shareholders, thereby bypassing the implementation of potentially abusive takeover tactics by target company management. If an offeror so chooses, it can invoke the law simply by filing the necessary information statement and thus force a shareholder vote on the proposed acquisition. Should the offeror prevail in the shareholder vote, it would be difficult, if not impossible, for target company management to employ defensive tactics to defeat the offer, if shareholders have already voiced their approval of the transaction.

Control share acquisition laws will similarly inhibit "greenmail," [22] a common abusive purpose of offering companies.

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[22] "Greenmail" has been defined as "[t]aking a large position in a company's stock, threatening a takeover, and then selling the shares back to the company at above-market prices. In short, it's

Payment of greenmail can economically devastate a target company and its shareholders, as well as deprive the shareholders from considering an offer they might otherwise approve.[23] Again, target company management cannot as readily agree to pay greenmail in the purported best interest of the shareholders when a process is available for the shareholders themselves to decide the propriety of the takeover transaction. As a consequence, an offering company cannot as easily extract greenmail from a target company, and therefore, the incidence of greenmail will presumably decrease dramatically due to the existence of control share acquisition legislation.

It is apparent, then, that the control share acquisition statutes provide real and substantial benefits by inhibiting abusive takeover practices, thereby enhancing the rights of shareholders.

**iv. The legislation enhances a state's business climate.**

The control share acquisition laws enhance a state's business climate, and, as a result, encourage investment in the regulating state and its domestic corporations. It is not disputed that the corporate takeovers can in a very short period dramatically alter a target company's business operations, whether it be, for example, the extortion of greenmail,[24] or merely the draining of the target's assets. The subject state

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a form of legal corporate blackmail." Reiser, *Corporate Takeovers: A Glossary of Terms & Tactics,* 89 Case & Com. 35, 44 (1984) (footnote omitted).

[23] *See, e.g.,* Note, *Exclusionary Tender Offers: A Reasonably Formulated Takeover Defense or A Discriminatory Attempt To Retain Control?,* 20 Ga. L. Rev. 627, 652-56 (1986); Note, *Greenmail: Targeted Stock Repurchases and the Management—Entrenchment Hypothesis,* 98 Harv. L. Rev. 1045, 1064-65 (1985).

[24] *See supra* note 22.

statutes afford to shareholders of domestic corporations the right to vote on control share acquisitions and thereby have some say in the future course and direction of their company. This ensures an orderly transition of control and power in the company pursuant to an informed and reasoned process wherein the shareholders have the ultimate voice in determining whether a change of control is best for their company.

It is important to note that promotion of a state's business climate is not premised upon precluding corporate raiders from moving business operations outside the regulating state. Instead, as indicated above, control share acquisition legislation promotes a state's business environment by providing an opportunity to shareholders of that state's corporations at least to participate in deciding the fate of their company. Due to the lightning-quick manner in which even longstanding shareholders, including the "founding fathers," of a corporation can be affected by a control share acquisition, extension of the shareholder democracy principle to these transactions is certainly attractive to businesses and their investors.

**b. The burden on interstate commerce is insignificant in relation to the local benefits derived from control share acquisition legislation.**

The burden imposed on interstate commerce by control share acquisition statutes is a limited restriction on an acquiring person in purchasing a particular amount of stock in a domestic company. The laws apply only to control share acquisitions, and even then they do not preclude such purchases. Rather, the legislation requires shareholder approval of control share acquisitions. Significantly, the control share acquisition provisions do not restrict other persons from buying or selling shares in the corporation.

Certainly, the burden on interstate commerce is no different than the one imposed by operation of corporate merger statutes. For example, a cash-out merger is clearly and constitutionally subject to shareholder approval.[25] Identical to the control share acquisition statutes, if a cash-out merger is collectively disapproved by shareholders, an individual shareholder is unable to sell his or her stock to the merging company in accordance with the proposed merger. This would be the case even if the merging company were a foreign corporation and no shareholders of the domestic company resided in the regulating state. Thus, the impact on interstate commerce is the same under a proposed control share acquisition and a cash-out merger.

Just as significant is that any burden on interstate commerce occasioned by the legislation is no greater than that imposed by state laws which require regulatory approval of control share acquisitions. Such laws can completely foreclose a transaction in interstate commerce. Yet, these state laws have been declared constitutional even though they impact on the ability of persons residing outside the regulating state to purchase stock in interstate commerce. *See, e.g., Baltimore Gas & Elec. Co. v. Heintz,* 760 F.2d 1408, 1421, 1427 (4th Cir.), *cert. denied,* 106 S. Ct. 141 (1985).

Furthermore, in the event a control share acquisition does not obtain shareholder approval, it is speculative whether the loss of such a transaction is actually a burden on interstate commerce. The recent rash of corporate takeovers shows that the economy and society in general are not always well served by such transactions. For example, greenmail, which is often incidental to and a purpose of a threatened control share acquisition, detrimentally affects both a target company and

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[25] *See, e.g.,* Minn. Stat. § 302A.613, subd. 2 (1984); *Ashley v. Ryan,* 153 U.S. 436, 446 (1894).

its shareholders and furthers no worthy interest.[26] Discouraging these types of transactions serves to benefit, not burden, interstate commerce.

Presumably, if an acquiring person makes a reasonable proposal to the target company's shareholders, the proposed acquisition will be approved. Only those transactions that detrimentally impact on the company and its shareholders will fail to receive shareholder approval.

In measuring the alleged burden on interstate commerce, it must be recognized that a shareholder, no matter where he or she resides, purchases stock in a company subject to the laws of the state of incorporation. *See Broderick v. Rosner*, 294 U.S. 629, 644 (1935); *First National Bank v. Gustin-Minerva C.M. Company*, 42 Minn. 327, 328, 44 N.W. 198, 198-99 (1890). The domestic corporation laws effectively form a contract or charter between the corporation, its shareholders and the regulating state. *E.g., Aiple v. Twin City Barge & Towing Co.*, 274 Minn. 38, 46, 143 N.W.2d 374, 379 (1966); *Seitz v. Michel*, 148 Minn. 80, 84, 181 N.W. 102, 104 (1921). *See generally* 7A Fletcher, *Cyclopedia of Corporations*, § 3657 (Supp. 1986). Accordingly, as a matter of law, a shareholder purchases stock knowing full well that the incorporating state's corporate laws may impose restrictions on the accumulation of such stock.

Upon balancing the burden imposed by and benefits derived from the control share acquisition statutes, it is apparent that the legislation is constitutional. Like almost any state law, such as a corporate merger statute, the legislation under review in this case imposes some burden on interstate commerce. However, this burden is indirect and insignificant in relation to the benefits derived from the law. As a consequence, the

[26] *See supra* note 23.

burden imposed on interstate commerce by the law is *not clearly excessive* in comparison to the local benefits underlying the legislation.

## II. CONTROL SHARE ACQUISITION LEGISLATION, SUCH AS THE ICSAA AND MCSAA, DOES NOT VIOLATE THE SUPREMACY CLAUSE.

It is undisputed that Congress has never expressed any intent to preempt state corporation laws, in the Williams Act or elsewhere, nor has it indicated any intent to occupy the entire field of such regulation. *See, e.g., Cardiff Acquisitions, Inc. v. Hatch*, 751 F.2d 906, 913 (8th Cir. 1984); *Agency Rent-A-Car, Inc. v. Connolly*, 686 F.2d 1029, 1036-37 (1st Cir. 1982). Because it is not physically impossible to comply with both the Williams Act and a control share acquisition law, the issue before the Court is whether state law so conflicts with the federal law that the state statute *substantially* frustrates the objectives of federal legislation. If not, the state law must be upheld. *See, e.g., Edgar v. MITE Corp.*, 457 U.S. 624, 632 (1982); *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

An examination of the state and federal laws demonstrates that the control share acquisition statutes do not frustrate, even in an insubstantial way, the purposes underlying the Williams Act. Indeed, the express objective and the timetable of the ICSAA, and certainly statutes like the MCSAA, are consistent with federal law. Moreover, the applicability of control share acquisition statutes to non-tender offer control share acquisitions does not conflict with the Williams Act.

### A. The Objective Of Control Share Acquisition Laws, Such As The ICSAA And MCSAA, Is Consistent With, And Therefore Does Not Substantially Frustrate, The Purposes Of The Williams Act.

It is unquestioned that the principal and overriding objective of Congress in adopting the Williams Act was the protection of investors. *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 22-24 (1977); *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122, 1129 (8th Cir. 1982); *Missouri Portland Cement Co. v. H.K. Porter Company, Inc.*, 535 F.2d 388, 393 (8th Cir. 1976). Similarly, control share acquisition legislation has been enacted to protect shareholders.[27] To accomplish this purpose, the laws impose the requirement that the shareholders vote on and approve the proposed acquisition.[28] As discussed previously, this requirement enhances the individual and collective rights of shareholders by allowing them, in accordance with the fundamental principle of shareholder democracy, to control the destiny of their company, by mitigating the coercive nature of control share acquisitions and by inhibiting the abusive use of takeover tactics. See *supra* at 11-20.

Not only do these state laws further the investor protection objective of the Williams Act, but they also do not disrupt the balance created by the Williams Act between the acquiring person and target company management.[29] Indeed, in promot-

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[27] For example, the Minnesota Legislature specifically stated that the MCSAA was intended to "provide to shareholders both necessary information and the opportunity to thus cast fully informed votes on any takeover transactions." Act of April 25, 1984, ch. 488, § 1, subd. 2(2), 1984 Minn. Laws 471.

[28] Ind. Code Ann. §§ 23-1-42-6 and -7 (Burns Cum. Supp. 1986), and Minn. Stat. § 302A.671, subds. 2 and 4 (Supp. 1985), as amended.

[29] *See Schreiber v. Burlington Northern, Inc.*, 105 S. Ct. 2458, 2463 (1985).

ing shareholders' interests by requiring collective shareholder approval of a control share acquisition, the legislation operates in an evenhanded manner. Both the offeror and management are subject to the same federal proxy rules and the same time constraints in presenting their respective positions to the shareholders. Consequently, the statutes favor neither management nor the offeror in presenting the proposed control share acquisition to a vote of the shareholders.

### B. The Timetables Set Forth In Control Share Acquisition Legislation Like The ICSAA, And Particularly The MCSAA, Do Not Substantially Frustrate The Purposes Of The Williams Act.

The ICSAA is tailored to avoid any conflict with the procedural requirements of the Williams Act in the event a tender offer is made. The disclosure and voting requirements of the ICSAA are structured so they will be completed no later than 50 days after the information statement relating to the proposed acquisition is delivered to the target corporation.[30] As a result, the requirements of the ICSAA will be satisfied prior to the time that shareholders can, pursuant to the Williams Act, withdraw any tendered shares.[31]

Control share acquisition statutes like the MCSAA present an even clearer case of no conflict between the state and federal laws. Under the MCSAA, the required shareholder vote must be completed within twenty (20) business days of the

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[30] Ind. Code Ann. § 23-1-42-7 (Burns Cum. Supp. 1986).

[31] Effectively, shareholders may withdraw any tendered shares for up to 15 business days after the tender offer is commenced or after 60 calendar days following commencement. Thus, under the Williams Act, the shareholder is unable to withdraw any tendered shares between the 16th business day and the 60th calendar day after the offer. 15 U.S.C.A. § 78n(d)(5) (1981) and 17 C.F.R. § 240.14d-7(a)(1) (1986).

target company's receipt of the information statement. Act of March 24, 1986, ch. 431, § 2, 1986 Minn. Laws 703. Accordingly, the Minnesota law does not conflict with the twenty (20) business day minimum period for an offer to remain open under the Williams Act,[32] as all state mandated procedures will be completed within the twenty (20) business day period. *See Cardiff Acquisition, Inc. v. Hatch,* 751 F.2d 906 (8th Cir. 1984). Hence, there is absolutely no delay occasioned by the Minnesota law in the consummation of a tender offer under the Williams Act.

The argument that the shareholder vote *could* be extended beyond the state law time frame because of *possible* delay in counting votes, or because of *possible* vote challenges, does not present a proper reason for invalidating the state legislation. Such speculative and hypothetical contentions cannot be a basis for deciding constitutional challenges. *See, e.g., Bardini Petroleum Co. v. Superior Court,* 284 U.S. 8, 22 (1931) ("Constitutional questions are not to be dealt with abstractly."). Moreover, even assuming, *arguendo,* that the Court could speculate as to potential for delay in the vote process, there is no showing that this hypothetical delay would constitute an "unreasonable delay," as envisioned by a plurality of the Court in *Edgar v. MITE Corp.,* 457 U.S. 624, 639 (1982).

It is also suggested that a control share acquisition statute is unconstitutional because it could preclude altogether the consummation of a tender offer if the acquiring person does not prevail in the shareholder vote. However, the Williams Act establishes no substantive federal right to purchase shares pursuant to a tender offer. *See, e.g., Piper v. Chris-Craft Industries, Inc.,* 430 U.S. 1 (1977); *AMCA International Corp.*

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[32] 17 C.F.R. 240.14e-1 (1986).

*v. Krause*, 482 F. Supp. 929, 937 (S.D. Ohio 1979). It merely regulates the process by which an offeror must make his offer to purchase shares. The control share acquisition legislation does not interfere with this process. Rather, it simply accords to shareholders, on a collective basis, the right to approve or disapprove a change in control of their corporation—a transaction that can fundamentally alter the make-up and future of their corporation. To deprive shareholders of such an important right would be contrary to the traditionally democratic nature of corporate governance. To deny the states the power to grant such a right would be a dramatic departure from the historical role that states have played in regulating the corporations which they create.

### C. The Applicability Of Control Share Acquisition Statutes To Non-Tender Offer Control Share Acquisitions Does Not Conflict With The Williams Act.

The Williams Act does not regulate non-tender offer transactions, such as open market purchases, except to the extent it requires any person who has accumulated more than five percent of a company's stock to make a Schedule 13D filing with the Securities and Exchange Commission. Section 13(d) of the Securities Exchange Act of 1934.[33] As such, the requirements of control share acquisition statutes do not conflict with the Section 13(d) disclosure provisions of the Williams Act and, for the reasons discussed above, actually further the investor protection purposes of the federal law. *See supra* at 11-20.

Nonetheless, it is suggested that the Williams Act, in a non-tender offer transaction, *implicitly* authorizes an open market

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[33] 15 U.S.C.A. § 78m(d)(1) (1981). *See also* 17 C.F.R. § 240.13d-1 (1986).

or other acquisition of stock without any delay occasioned by state regulation. This argument is without merit.

Not only is it presumed that Congress did not preempt state law,[34] but there is simply no compelling indication that Congress, by its silence, intended to tacitly supersede state corporate laws. To the contrary, the Williams Act, in the non-tender offer context, only provides a disclosure mechanism relating to the accumulation of stock in a particular company. The federal law is by no means so pervasive as to preclude the states from invoking their historical authority to regulate domestic corporations.[35] *See, e.g., Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

As discussed previously, *see supra* at 14, the Williams Act regulates a different subject matter than do control share acquisition statutes. The federal law pertains to disclosures in the securities context, whereas the state law governs control share acquisitions which could materially impact on a domestic company's internal affairs. The federal and state laws, consistent with their traditional authority to regulate in their respective areas, constitutionally co-exist.

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[34] *See, e.g., Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n.*, 461 U.S. 190, 206 (1983); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

[35] This conclusion finds compelling support in *Agency Rent-A-Car, Inc. v. Connolly*, 686 F.2d 1029, 1036-37 (1st Cir. 1982). In that case, the court convincingly rejected the argument that Congress intended to occupy the entire field of control share acquisitions in adopting the Williams Act. The court therefore upheld, against a preemption challenge, a state law which regulated all methods of acquiring stock in a target corporation, whether by open market purchase, by solicitation of particular shareholders, by tender offer, or otherwise. In so doing, the First Circuit Court of Appeals recognized that Congress has not evinced an intent in the Williams Act, implicitly or otherwise, to preempt state law. 686 F.2d at 1036-37.

## CONCLUSION

Based on the foregoing, *Amicus Curiae* State of Minnesota hereby requests that the Court reverse the decision of the Seventh Circuit Court of Appeals.

Dated: December 4, 1986.

Respectfully submitted,

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# APPENDIX

Minn. Stat. § 302A.671 (Supp. 1985), as amended by Act of March 24, 1986, ch. 431, §§ 2 and 21, 1986 Minn. Laws 703, 706 provides:

302A.671 CONTROL SHARE ACQUISITIONS.

Subdivision 1. Authorization in articles. (a) Unless otherwise expressly provided in the articles or in bylaws approved by the shareholders of an issuing public corporation, this section does not apply to a control share acquisition.*

(b) All shares acquired by an acquiring person in violation of subdivision 4 shall be denied voting rights for one year after acquisition, the shares shall be nontransferable on the books of the corporation for one year after acquisition and the corporation shall, during the one-year period, have the option to call the shares for redemption at the price at which the shares were acquired. Such a redemption shall occur on the date set in the call notice but not later than 60 days after the call notice is given.

Subd. 2. Information statement. An acquiring person shall deliver to the issuing public corporation at its principal executive office an information statement containing all of the following:

(a) the identity of the acquiring person;

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* This provision, Minn. Stat. § 302A.671, subd. 1(a), becomes effective on August 1, 1987, in accordance with Act of June 24, 1985, 1st Spec. Sess. ch. 5, § 21, 1985 Minn. Laws 1640 and Act of March 24, 1986, ch. 431, § 21, 1986 Minn. Laws 706. Minn. Stat. § 302A.671, subd. 1(a) as currently in effect is codified at Minn. Stat. § 302A.-671, subd. 1(a) (1984) and provides:

Subd. 1. Authorization in articles. (a) Unless otherwise expressly provided in the articles of an issuing public corporation, this section applies to a control share acquisition.

(b) a reference that the statement is made under this section;

(c) the number of shares of the issuing public corporation beneficially owned by the acquiring person;

(d) a specification of which of the following ranges of voting power in the election of directors would result from consummation of the control share acquisition:

(1) at least 20 percent but less than 33-1/3 percent;

(2) at least 33-1/3 percent but less than or equal to 50 percent;

(3) over 50 percent; and

(e) the terms of the proposed control share acquisition, including, but not limited to, the source of funds or other consideration and the material terms of the financial arrangements for the control share acquisition, plans or proposals of the acquiring person to liquidate the issuing public corporation, to sell all or substantially all of its assets, or merge it or exchange its shares with any other person, to change the location of its principal executive office or of a material portion of its business activities, to change materially its management or policies of employment, to alter materially its relationship with suppliers or customers or the communities in which it operates, or make any other material change in its business, corporate structure, management or personnel, and such other objective facts as would be substantially likely to affect the decision of a shareholder with respect to voting on the proposed control share acquisition.

Subd. 3. MEETING OF SHAREHOLDERS. Within five days after receipt of an information statement pursuant to subdivision 2, a special meeting of the shareholders of the issuing public corporation shall be called pursuant to section 302A.433, subdivision 1, to vote on the proposed control share acquisition. The meeting shall be held no later than 20 busi-

ness days after receipt of the information statement, unless the acquiring person agrees to a later date. The notice of the meeting shall at a minimum be accompanied by a copy of the information statement and a statement disclosing that the board of directors of the issuing public corporation recommends acceptance of, expresses no opinion and is remaining neutral toward, recommends rejection of, or is unable to take a position with respect to the proposed control share acquisition. The notice of meeting shall be given at least ten days prior to the meeting.

Subd. 4. Consummation of control share acquisition. The acquiring person may consummate the proposed control share acquisition if and only if both of the following occur:

(1) the proposed control share acquisition is approved by the affirmative vote of the holders of a majority of the voting power of all shares entitled to vote.

A class or series of shares of the corporation is entitled to vote as a class or series if any provision of the control share acquisition would, if contained in a proposed amendment to the articles, entitle the class or series to vote as a class or series; and

(2) the proposed control share acquisition is consummated within 180 days after shareholder approval.

Subd. 5. Rights of action. An acquiring person, an issuing public corporation, and shareholders of an issuing public corporation may sue at law or in equity to enforce the provisions of this section and section 302A.449, subdivision 7.

Subd. 6. Return of shares if acquisition not consummated. If the proposed control share acquisition is not consummated in accordance with this section, the acquiring person shall immediately return any and all shares held in anticipation of the

consummation to the shareholders from whom the person received the shares.

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Minn. Stat. § 302A.449, subd. 7 (Supp. 1985), as amended by Act of March 24, 1986, ch. 431, § 1, 1986 Minn. Laws 703 provides:

Subd. 7. PROXY IN CONTROL SHARE ACQUISITION. Notwithstanding any contrary provision of this chapter, a proxy relating to a meeting of shareholders required under section 302A.671, subdivision 3, must be solicited separately from the offer to purchase or solicitation of an offer to sell shares of the issuing public corporation. Except for irrevocable proxies appointed in the regular course of business and not in connection with a control share acquisition, all proxies appointed for or in connection with the shareholder authorization of a control share acquisition pursuant to section 302A.671 shall be at all times terminable at will prior to the obtaining of the shareholder authorization, whether or not the proxy is coupled with an interest. Without affecting any vote previously taken, the proxy may be terminated in any manner permitted by subdivision 3, or by giving oral notice of the termination in the open meeting of shareholders held pursuant to section 302A.671, subdivision 3. The presence at a meeting of the person appointing a proxy does not revoke the appointment.

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Minn. Stat. § 302A.011, subds. 37-41 (1984 & Supp. 1985) (Definitions), provides:

Subd. 37. Acquiring person. "Acquiring person" means a person that is proposing to make a control share acquisition. When two or more persons act as a partnership, limited partnership, syndicate, or other group for purposes of ac-

quiring, owning or voting securities of an issuing public corporation, the syndicate or group is a "person."

"Acquiring person" does not include a licensed broker/dealer or licensed underwriter who (1) purchases shares of an issuing public corporation solely for purposes of resale to the public; and (2) is not acting in concert with an acquiring person.

Subd. 38. Control share acquisition. "Control share acquisition" means an acquisition of shares of an issuing public corporation resulting in beneficial ownership by an acquiring person of a new range of voting power specified in section 302A.671, subdivision 2, paragraph (d), but does not include any of the following:

(1) an acquisition before, or pursuant to an agreement entered into before, August 1, 1984;

(2) an acquisition by a donee pursuant to an inter vivos gift not made to avoid section 302A.671 or by a distributee as defined in section 524.1-201, clause (10);

(3) an acquisition pursuant to a security agreement not created to avoid section 302A.671;

(4) an acquisition under sections 302A.601 to 302A.661, if the issuing public corporation is a party to the transaction; or

(5) an acquisition from the issuing public corporation.

Subd. 39. Issuing public corporation. "Issuing public corporation" means a corporation with at least 50 shareholders and which has either its principal place of business located in this state or owns or controls assets located within this state that have a fair market value of at least $1,000,000.

Subd. 40. Publicly held corporation. "Publicly held corporation" means a corporation that has a class of equity securities registered pursuant to section 12 of the Securities Exchange Act of 1934, as amended through December 31, 1984.

Subd. 41. Beneficial ownership. Beneficial owner includes, but is not limited to, any person who directly or indirectly through any contract, arrangement, understanding, relationship, or otherwise has or shares the power to vote or direct the voting of a security and the power to dispose of, or direct the disposition of, the security. "Beneficial ownership" includes, but is not limited to, the right, exercisable within 60 days, to acquire securities through the exercise of options, warrants, or rights or the conversion of convertible securities, or otherwise. The securities subject to these options, warrants, rights, or conversion privileges held by a person shall be deemed to be outstanding for the purpose of computing the percentage of outstanding securities of the class owned by this person, but shall not be deemed to be outstanding for the purpose of computing the percentage of the class owned by any other person. A person is the beneficial owner of securities beneficially owned by any relative or spouse or relative of the spouse residing in the home of this person, any trust or estate in which this person owns ten percent or more of the total beneficial interest or serves as trustee or executor, any corporation or entity in which this person owns ten percent or more of the equity, and any affiliate or associate of this person.

(10) (9)

Nos. 86-71 and 86-97



# In the Supreme Court of the United States

OCTOBER TERM, 1986

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CTS CORPORATION, APPELLANT

*v.*

DYNAMICS CORPORATION OF AMERICA, ET AL.

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STATE OF INDIANA, APPELLANT

*v.*

DYNAMICS CORPORATION OF AMERICA, ET AL.

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*ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION AND THE UNITED STATES AS AMICI CURIAE

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## QUESTION PRESENTED

Whether the Control Share Acquisitions Chapter of the Indiana Business Corporation Law is unconstitutional under the Supremacy Clause or the Commerce Clause of the United States Constitution.

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**BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION AND THE UNITED STATES AS AMICI CURIAE**

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## INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION AND THE UNITED STATES

These appeals present the question whether the Control Share Acquisitions Chapter of the Indiana Business Corporation Law is constitutional as applied to "control share acquisitions" occurring in interstate commerce. The Securities and Exchange Commission and the United States submit this brief primarily to address the constitutionality of the Indiana statute under the Commerce Clause.

The Commission is responsible for the administration and enforcement of the federal securities laws, including

the regulation of national securities exchanges and other securities markets and the regulation of tender offers in interstate commerce. See generally Securities Exchange Act of 1934, 15 U.S.C. (& Supp. III) 78a *et seq.* As the federal agency primarily responsible for regulating the national securities marketplace in the public interest and for the protection of investors, the Commission has a substantial interest in the question whether a state law regulating "control share acquisitions" unconstitutionally burdens the national securities marketplace, which is an important part of interstate commerce.

The United States has an interest in proper interpretation of the role of the Commerce Clause in our federal system. The United States has an interest in both the free flow of commerce among the states and proper consideration of the prerogatives of the states.

## STATEMENT

1. Appellant CTS Corporation (CTS) is an Indiana corporation with its principal place of business and substantial assets in Indiana (CTS J.S. App. A5). The common stock of CTS is listed for trading on the New York Stock Exchange (*ibid.*).[1] This case arises out of efforts of Dynamics Corporation of America (Dynamics), a publicly held corporation organized under the laws of New York, with its principal place of business in Connecticut, to acquire additional shares of stock in CTS by means of a tender offer (*ibid.*).

As of March 10, 1986, Dynamics was the beneficial owner of approximately 9.6% of the common stock of CTS, which was then selling at approximately $36 per share (CTS J.S. App. A1, A6, A13). On that date, Dynamics initiated a cash tender offer for another 1 million shares of CTS stock at $43 per share (*id.* at A1, A5). The addition of 1 million shares to the stock it already owned would give Dynamics a total of approxi-

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[1] The common stock of CTS is registered with the Commission pursuant to Section 12(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78*l*(b) (CTS J.S. App. A5).

mately 27.5% of the common stock of CTS (*id.* at A1). As required by the Williams Act, Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified at 15 U.S.C. 78m(d)-(e) and 78n(d)-(f)), Dynamics and CTS made certain filings with the Commission in connection with this tender offer.

Also on March 10, Dynamics announced its intention to elect a full slate of nominees to the CTS board of directors at the annual shareholders meeting scheduled for the following month (CTS J.S. App. A31-A32; CTS Br. 2; Dynamics Mot. to Aff. 2). On the same day, Dynamics filed suit in the United States District Court for the Northern District of Illinois challenging CTS's proxy solicitations for the upcoming meeting (CTS J.S. App. A2).[2] The issues raised in the initial complaint are not before this Court.

2. Several days before the commencement of Dynamics' tender offer, the Governor of Indiana had signed into law a revised Indiana Business Corporation Law (Ind. Code Ann. §§ 23-1-17-1 to 23-1-54-2 (Burns Supp. 1986)), which included the Control Share Acquisitions Chapter (*id.* §§ 23-1-42-1 to -11).[3] Starting August 1, 1987, the new Business Corporation Law will apply to all Indiana corporations (Ind. Code Ann. § 23-1-17-3(a)), but corporations will be allowed to amend their articles of incorporation or bylaws to opt out of the Control Share Chapter (*id.* § 23-1-42-5). Before August 1, 1987, the statute is not automatically applicable but allows corporations to opt into the new Business Corporation Law, including its Control Share Acquisitions Chapter, by res-

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[2] In its complaint, Dynamics sought to enjoin CTS's proxy solicitations as violative of Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78n(a), and the Commission's rules thereunder (CTS J.S. App. A29-A30).

[3] The new law was signed on March 4, 1986. Hereafter, all citations to the Business Corporation Law and its Control Share Acquisitions Chapter will be to the version appearing in the 1986 Cumulative Supplement to Burns Indiana Statutes Annotated, Code Edition. The Control Share Acquisitions Chapter is reprinted in CTS J.S. App. A167-A188.

olution of the board of directors and without any shareholder action (*id.* § 23-1-17-3(b)). On March 27, 1986, the CTS board of directors by resolution opted into the new statute as of April 1, 1986 (CTS J.S. App. A2, A33).

Pursuant to the new law, shares acquired in an "issuing public corporation"[4] in excess of certain prescribed levels of voting power, termed "control shares,"[5] are stripped of all voting rights unless the shareholders of the corporation, in the manner described below, vote to restore voting power to the control shares (Ind. Code Ann. §§ 23-1-42-5, -9). The shareholders decide whether to restore voting power to the control shares either at the next special or annual meeting (*id.* § 23-1-42-7(c)) or at a special meeting called at the request of the person who proposes to make or has made a control share acquisition. Management of the subject company must schedule a special shareholders meeting within 50 days after the acquiror (1) delivers an "acquiring person statement" setting forth specified information; (2) requests such a meeting; and (3) provides an undertaking to pay the

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[4] An "issuing public corporation" is defined as an Indiana corporation that has (1) 100 or more shareholders; (2) its principal place of business, its principal office, or substantial assets in Indiana; and (3) more than 10% of its shareholders resident in Indiana, or more than 10% of its shares owned by Indiana residents, or more than 10,000 of its shareholders resident in Indiana. Ind. Code Ann. §§ 23-1-20-5, 23-1-42-4(a).

[5] A "control share acquisition" is an acquisition of shares that causes the acquiror to cross the 20%, 33⅓%, or 50% threshold of voting power in an issuing public corporation. Ind. Code Ann. §§ 23-1-42-1, -2(a). "Control shares" are those acquired in such a transaction and any other shares acquired within 90 days or pursuant to a plan to make a control share acquisition. *Id.* §§ 23-1-42-1, -2(b). Dynamics' proposed acquisition would have crossed the 20% threshold. Certain acquisitions, such as acquisitions pursuant to the laws of descent and distribution, are excepted from the definition of "control share acquisition." *Id.* § 23-1-42-2(d) and (e). Acquisitions pursuant to an agreement of merger or plan of share exchange to which the corporation is a party are also excepted from the definition. *Id.* § 23-1-42-2(d)(5).

expenses of the meeting. *Id.* §§ 23-1-42-6 and -7. If the acquiror does not submit an acquiring person statement, or if the control shares are not given voting rights by the shareholders, then after a specified period the acquiror's shares may be redeemed by the subject company, if its articles of incorporation or bylaws permit (*id.* § 23-1-42-10).

In order for the control shares to get back their voting rights, the acquiror must prevail on two votes.[6] Under Ind. Code Ann. § 23-1-42-9(b)(1), there is a vote in which all shareholders of record are entitled to vote.[7] Under Ind. Code Ann. § 23-1-42-9(b)(2), there is a vote in which "interested shares" are disqualified from voting.[8] The acquiror will prevail only if, in each vote, the grant

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[6] This appears to be the reasonable construction of the statute. The State, however, argues (Indiana Br. 29 n.*) that the new law requires two votes *only* "if the proposed control share acquisition would, if fully carried out, result in any of the changes described in IC 23-1-38-4(a)," relating to changes in the capital structure of the company.

[7] Section 23-1-42-9(b)(1) provides:

> To be approved under this section, the resolution must be approved by: * * * Each voting group entitled to vote separately on the proposal by a majority of all the votes entitled to be cast by that voting group, with the holders of the outstanding shares of a class being entitled to vote as a separate voting group if the proposed control share acquisition would, if fully carried out, result in any of the changes described in IC 23-1-38-4(a) * * *.

[8] "Interested shares" are defined in Ind. Code Ann. § 23-1-42-3 as shares owned by the acquiror, any officer of the issuing public corporation, or any employee of the issuing public corporation who is also a director. Shares held by directors who are not employees are not "interested shares" and may be voted in both votes. The requirement of a double victory poses a special problem for the acquiror: if it seeks to offset management-controlled shares in the "all-share" vote by buying tendered shares, these shares (which presumably would have been likely to vote in favor of the acquiror) will not be counted in the "disinterested share" vote.

of voting rights to the control shares is approved by a majority of the votes entitled to be cast.[9]

3. After the CTS board elected to be governed by the Control Share Acquisitions Chapter, Dynamics did not comply with the provisions of the Chapter but instead immediately amended its complaint in this action. Dynamics sought injunctive relief and a declaration that the Control Share Acquisitions Chapter was preempted by the Williams Act and imposed an unconstitutional burden on interstate commerce in violation of the Commerce Clause. CTS J.S. App. A2, A33-A34.

The district court entered an order on April 9, 1986, invalidating the Chapter as violative of the Supremacy Clause (CTS J.S. App. A87). In a second opinion, issued April 16, 1986, the district court ruled for Dynamics and against CTS on the additional ground that the statute impermissibly burdens interstate commerce (*id.* at A124, A139).

In an expedited appeal, the court of appeals affirmed both rulings of the district court (CTS J.S. App. A2, A28).[10] The court noted the dual-vote feature of the Control Share Chapter, *i.e.*, that "[a] decision in favor of awarding voting rights requires a majority both of all shares and of all 'disinterested' shares" and that, "[w]ithout these two majorities, the acquirer's shares remain nonvoting shares" (*id.* at A20). The court found it "fairly transparent" that the Chapter was drafted "to skirt judicial holdings that forbid states to delay tender offers beyond the period required by the Williams Act"

[9] In corporations with more than one class of stock, the approval must be given by a majority of the votes entitled to be cast in each "voting group," as defined in Ind. Code Ann. § 23-1-20-28. In the present case, because CTS has only one class of voting stock, there would be only one "voting group" for purposes of each of the two required votes.

[10] After the ruling of the court of appeals, Dynamics acquired tendered shares, increasing its ownership position in CTS to more than 27%. *Dynamics Corp. of America* v. *CTS Corp.*, 635 F. Supp. 1174, 1178 (N.D. Ill. 1986).

(*ibid.*), because an acquiror who is not interested in acquiring nonvoting shares is in effect forced to await the shareholders meeting before accepting tendered shares. "So he must hold the tender offer open for 50 days, rather than the 28 days required (on average) by the SEC's regulations under the Williams Act. * * * And he can have no great confidence in being able to win the vote on voting rights, since he cannot vote his own shares." *Ibid.*

The court of appeals explored the legislative history of the Williams Act and the substantial body of precedent interpreting it to forbid state legislation that adds delay to tender offers or otherwise upsets the balance that Congress struck between target management and tender offeror (CTS J.S. App. A21-A23). Despite admitting "doubts" about that precedent (*id.* at A23, A24), the court felt bound to follow it in light of *MITE Corp.* v. *Dixon*, 633 F.2d 486, 490-499 (7th Cir. 1980), aff'd on other grounds *sub nom. Edgar* v. *MITE Corp.*, 457 U.S. 624 (1982).[11] The court found it a "straightforward" matter to apply that precedent to invalidate the Chapter, since both the delay imposed by the Control Share Chapter and its shareholder-vote provisions were inimical to tender offers (CTS J.S. App. A23).

In deciding the Commerce Clause issue, the court weighed the local benefits provided by the Control Share Chapter against the burden that it places on interstate commerce (CTS J.S. App. A24-A27). The court found a burden on interstate commerce because "we can assume that the vast majority of both [CTS's] shareholders and Dynamics' shareholders are nonresidents [of Indiana, and t]he statute gravely impairs Dynamics' ability to do busi-

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[11] Justice White's opinion in *MITE* reached the Williams Act issue and agreed with the Seventh Circuit (457 U.S. at 630-640), but that portion of the opinion was joined by only three Justices. The other two Justices who addressed the issue disagreed (*id.* at 646-647 (opinion of Powell, J.); *id.* at 655 (opinion of Stevens, J.)). See note 12, *infra*.

ness with any of CTS's shareholders" (*id.* at A25); because "the Indiana statute is calculated to impede transactions between residents of other states" (*ibid.*); and because "the efficiency with which [corporate assets] are employed * * * depends on the market for corporate control—an interstate, indeed international, market that the State of Indiana is not authorized to opt out of, as in effect it has done in this statute" (*id.* at A26 (citing *Edgar* v. *MITE Corp.*, 457 U.S. at 463 (opinion of the Court))). The court found no sufficient countervailing local benefit because "Indiana has no interest in protecting residents of Connecticut from being stampeded to tender their shares to Dynamics at $43" (CTS J.S. App. A25 (citing *MITE*, 457 U.S. at 642-643 (opinion of the Court))) and because residents of Indiana receive "trivial or even negative benefits" from the Control Share Chapter (CTS J.S. App. A25). The court rejected a claim that the "internal affairs" doctrine could save the statute, since "in this case the effect on the interstate market in securities and corporate control is direct, intended, and substantial; it is not merely the incidental effect of a general regulation of internal corporate governance" (*id.* at A27). Thus, the court held that the Control Share Chapter is invalid under the Commerce Clause.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The Commission and the United States believe that the judgment of the court of appeals should be affirmed. This brief argues for affirmance only on the ground that the Chapter violates the Commerce Clause for a more specific reason than the reasons offered by the court of appeals.

The United States believes that the Indiana Chapter is not preempted by the Williams Act. As stated by appellant CTS (Br. 16-17), there is no conflict between any provision of the Williams Act and any provision of the Indiana Chapter that makes it impossible to comply with

both statutes. As also stated by appellant CTS (Br. 21-22), there is no preemptive federal statutory policy that the Indiana Chapter violates: the Williams Act was designed to favor neither the takeover bidder nor target management, see *Piper* v. *Chris-Craft Industries*, 430 U.S. 1, 29 (1977), but it does not prohibit states from adopting laws that operate to favor one side or the other, unless those laws conflict with the Williams Act or the Commission's regulations under that Act. Cf. *ibid.*

The Indiana Chapter does offend the Commerce Clause. It applies to "public" corporations, a category defined so as to consist, in substantial part, of corporations whose shares have been offered and sold in interstate commerce. CTS is such a corporation: its common stock is listed on the New York Stock Exchange. The central feature of the Indiana Chapter is an express restraint on certain transfers of the voting rights of such shares: the approval of "disinterested" shareholders is required before a willing seller may sell his voting rights to a willing purchaser in a transaction that meets the definition of "control share acquisition." As a practical matter, in all cases in which the buyer's objective is in fact "control," the Indiana Chapter makes that approval a precondition to the sale of the shares themselves.

A chartering state does not violate the Commerce Clause when it exercises its broad power to define, modify from time to time, and enforce the rights represented by shares of stock of the corporations it charters. In particular, a state may, in the exercise of its chartering function, require or permit voting rights to be distributed in a virtually limitless variety of ways: for example, a chartering state may provide (should it for some reason wish to do so) for a class of corporations in which no person may own more than 20% of the voting shares. A state performing its chartering functions does not offend the Commerce Clause, notwithstanding the obvious effects of the state's actions on the

value and transferability of shares of the corporations it charters, because the chartering state is responsible for the very existence of the corporation and its shares, and it may define the latter as it wishes notwithstanding effects on their transferability.

Indiana has done something different. The Indiana Chapter does not define (or permit the corporate draftsman to define) voting rights in a manner (however common or uncommon) equally applicable to whoever holds or acquires shares. It is written as a restraint on the transferability of voting rights in certain transactions, and it could not be written in any other way without changing its meaning. Its effect is to tend to preserve whatever pattern of voting rights (and, consequently, share ownership) exists in a given corporation at a given time against transactions that would alter the pattern.

The Indiana Chapter provides that whatever voting rights the corporate charter grants to shares, and whatever the pattern of ownership of those shares may now be, no share transaction in which the buyer crosses one of the three specified thresholds of share ownership will be effective to transfer voting rights without the consent of disinterested shareholders. For example, Shareholder A, who today owns 20.1% of the common stock of an Indiana corporation whose shares are listed on the New York Stock Exchange, may vote all of the shares, and may freely buy more (up to 33⅓%, the next threshold); but no person B who today holds less than 20% of the shares can freely cross the 20% threshold and catch up with A, because the transfer of voting rights to B in a threshold-crossing transaction is prohibited unless approved in a shareholder vote that will not include B but will (unless A is an officer or a director-employee of the corporation) include A. It is impossible to state the rule that produces this result as a rule of general applicability to both A and B: the positions of A and B are separated by a burden, imposed by Indiana, on the transfer from third parties to B of the voting

rights (and the shares that embody them) necessary to put B in the same position as A. Indiana is regulating not voting rights but transactions in interstate commerce.

In *Edgar* v. *MITE Corp.*, 457 U.S. 624, 643-644 (1982), the Court invalidated an Illinois statute that regulated interstate tender offers on the ground that the statute imposed a burden on interstate commerce for which (even as applied to Illinois corporations) there was no valid offsetting "legitimate local interest." In *MITE*, the Court rejected the two principal arguments offered by appellants in defense of the Indiana Chapter: the right of a chartering state to prescribe rules governing the internal affairs of the corporations it charters, and the right of a chartering state to protect the shareholders of such corporations. The Court said that the "internal affairs doctrine" is a "conflict of laws principle" of "little use to the State in [the tender offer] context. Tender offers contemplate transfers of stock by stockholders to a third party and do not themselves implicate the internal affairs of the target company." *Id.* at 645. The Court also rejected the protection-of-shareholders argument on the ground that "the State has no legitimate interest in protecting nonresident shareholders. Insofar as the Illinois law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law." *Id.* at 644.

The United States believes that the language with which the Court in *MITE* rejected these two arguments was too broad. Prescribing rules governing corporate "internal affairs" and protecting the rights of shareholders are both valid and important activities of a chartering state. A corporation's chartering state is responsible for, inter alia, defining and enforcing the rights of all shareholders, both resident and nonresident, against the corporation, its directors and officers, and each other. Carrying out these responsibilities is an entirely legiti-

mate state function even though the state is necessarily projecting its law into interstate commerce whenever shares of a corporation it chartered are sold in the national marketplace.

Once it has defined the bundles of rights represented by shares and allowed the shares to enter interstate commerce, however, the chartering state does not have plenary power to define the circumstances under which the shares may be transferred. Such subsequent transfers, as this Court said in *MITE*, 457 U.S. at 645, "do not themselves implicate the internal affairs" of the corporation, and they therefore do not implicate the shareholder rights that the state is responsible for protecting.

Appellants seek to defend the Indiana Chapter on the ground that it merely deprives certain shares of voting rights under certain conditions and does not prohibit the transfer of anything. But as stated above the Indiana Chapter cannot be understood as a regulation of voting rights; it can only be coherently explained as a restraint on their transferability (and therefore on the transferability of the shares that embody them) in specified transactions. As the district court said, the Indiana Chapter "deprives the [control share] transaction of all value and therefore blocks the transaction in practical terms as much as would a direct prohibition on control acquisitions." CTS J.S. App. A79.

Appellants seek to distinguish *MITE* on the ground that the Illinois statute conferred power to block transactions on a state regulator, whereas the Indiana Chapter can be characterized as conferring a right on "disinterested" shareholders to participate in determining whether there will be an increase in the concentration of share ownership. We agree that this argument is not without substantial force. We nevertheless urge the Court to reject it on the ground that a state may not confer on shareholders a right that, inherently, is not a power to govern the corporation but a right to restrain interstate commerce.

## ARGUMENT

### THE INDIANA CONTROL SHARE ACQUISITIONS CHAPTER IS INVALID UNDER THE COMMERCE CLAUSE

### INTRODUCTION

State regulation of takeovers and tender offers began with a Virginia statute passed in 1968. See L. Loss, *Fundamentals of Securities Regulation* 601 (1983). The impetus for the Virginia legislation and legislation that followed in other states was generally said to be "[f]ears that established local concerns might be taken over by outside interests which in turn would close down plants and leave local residents jobless." E. Aranow & H. Einhorn, *Tender Offers for Corporate Control* 153 (1973); accord L. Loss, *supra*, at 601. By 1977, a substantial majority of the states had enacted tender-offer legislation. See E. Aranow, H. Einhorn & G. Berlstein, *Developments in Tender Offers for Corporate Control* 207 (1977); see also L. Loss, *supra*, at 601-602 & n.120; Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered*, 88 Yale L.J. 510, 510 (1979). After one of these "first-generation" state takeover statutes failed to pass constitutional muster in *Edgar* v. *MITE Corp.*, 457 U.S. 624 (1982),[12] courts applied the Court's reasoning to invalidate similar statutes. See

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[12] In *MITE*, this Court held the Illinois Business Take-over Act unconstitutional on Commerce Clause grounds. The Illinois Act required a tender offeror to notify the Secretary of State of Illinois 20 business days before commencement of a tender offer. The Secretary of State was empowered to convene a hearing, and the tender offer could not proceed until that hearing was completed. One function of the hearing was to permit the Secretary to review the substantive fairness of the tender offer; if an offer was found "unfair," it could be permanently blocked.

The Court's Commerce Clause opinion, written by Justice White, had two branches. One branch stands as the opinion of the Court, joined by five Justices (Chief Justice Burger and Justices White, Powell, Stevens, and O'Connor). It held that the Illinois Act was invalid under the Commerce Clause because it placed a substantial

cases cited in 1 M. Lipton & E. Steinberger, *Takeovers & Freezeouts* § 5.02[4] (1984); L. Loss, *Fundamentals of Securities Regulation* 603 (1983 & Supp. 1986); Block, Barton & Roth, *State Takeover Statutes: The "Second Generation"*, 13 Sec. Reg. L.J. 332, 337-339 (1986); Warren, *Developments in State Takeover Regulation:* MITE *and its Aftermath,* 40 Bus. Law. 671, 686-694 (1985).

Since *MITE* and the lower court decisions following it, several state legislatures have reconstructed their regulatory schemes in an attempt to regulate takeovers in ways that will survive constitutional scrutiny.[13] A common theme of these statutes is that, instead of purporting to regulate takeover bidders' activities as such, they invoke the state's authority to regulate corporate structure and shareholders' rights. See L. Loss, *supra,* at 100 & n.129c (Supp. 1986). Some commentators still seek

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burden on interstate commerce that outweighed any local benefits. 457 U.S. at 643-646.

In the other Commerce Clause branch of the opinion, joined by only four Justices (Chief Justice Burger and Justices White, Stevens, and O'Connor), the plurality concluded that the statute regulated interstate transactions taking place wholly outside of Illinois. Thus, the statute constituted a "direct" restraint on interstate commerce and was void even without an inquiry into the state interests involved. 457 U.S. at 641-643.

Three Justices (Chief Justice Burger and Justices White and Blackmun) found that the Illinois Act was invalid under the Supremacy Clause. 457 U.S. at 630-640. Two Justices (Justices Powell and Stevens) declined to join that holding. Three Justices (Justices Brennan, Marshall, and Rehnquist) believed that the case was moot and did not discuss the merits. *Id.* at 655-667. Justice Powell agreed that the case was moot but nevertheless joined the part of Justice White's opinion that constituted the opinion of the Court. *Id.* at 646-647.

[13] For a detailed discussion of these "second-generation" statutes, see 1 M. Lipton & E. Steinberger, *supra,* §§ 5.02-5.07; L. Loss, *supra,* at 99-101 (Supp. 1986); Block, Barton & Roth, *supra,* 13 Sec. Reg. L.J. at 339-354; Warren, *supra,* 40 Bus. Law. at 694-700; Sargent, *Do the Second-Generation State Takeover Statutes Violate the Commerce Clause?,* 8 Corp. L. Rev. 3, 5-6, 8-12 (1985).

to defend these statutes on the ground that they serve a legitimate local interest in preventing emigration of corporations and their assets. See, *e.g.*, Warren, *supra*, 40 Bus. Law. at 673 n.15; Newlin & Gilmer, *The Pennsylvania Shareholder Protection Act: A New State Approach to Deflecting Corporate Takeover Bids*, 40 Bus. Law. 111, 111-112 (1984). Others, however, defend them on the ground that they are merely a legitimate extension of more traditional forms of state corporation law. See, *e.g.*, Buxbaum, *Federalism and Company Law*, 82 Mich. L. Rev. 1163, 1175 (1984). Most courts that have ruled on the constitutionality of second-generation statutes have found them constitutionally infirm.[14] This case presents this Court with its first opportunity to pass on the constitutionality of a second-generation statute designed to avoid some of the problems that the *MITE* Court found with the first-generation statutes.

**A. The Indiana Chapter Can Only Be Understood As A Restraint On Transactions In Voting Rights And The Shares That Embody Them**

The Indiana Control Share Acquisitions Chapter prevents a shareholder of an Indiana "issuing public corporation," who may be situated anywhere in the nation, from conveying his voting rights to a buyer, wherever situated, in a "control share acquisition," unless two shareholder votes approve the conveyance. The category "issuing public corporation" is defined so as to include virtually every Indiana corporation that has offered and sold shares in interstate commerce (including appellant CTS). Most "control share acquisitions" would take

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[14] See *Fleet Aerospace Corp.* v. *Holderman*, 796 F.2d 135 (6th Cir. 1986), appeal pending *sub nom. Ohio* v. *Fleet Aerospace*, No. 86-344; *Gelco Corp.* v. *Coniston Partners*, Civ. No. 3-86-847 (D. Minn. Nov. 10, 1986); *Terry* v. *Yamashita*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,845 (D. Hawaii June 13, 1986); *APL Ltd. Partnership* v. *Van Dusen Air, Inc.*, 622 F. Supp. 1216 (D. Minn. 1985), vacated as moot, No. 85-5285 (8th Cir. Nov. 26, 1985); *Icahn* v. *Blunt*, 612 F. Supp. 1400 (W.D. Mo. 1985).

place in interstate commerce. The Indiana Chapter expressly restrains the transfer of voting rights in such transactions, and its obvious practical consequence is to restrain the transfer of the shares as well.

Appellants contend that the Indiana Chapter merely defines voting rights in certain shares in certain situations, as the chartering state has plenary authority to do, and does not restrain interstate commerce except in the same incidental manner as many other state statutes defining shareholder rights. Although chartering states have broad authority to define shareholder voting rights,[15] that is not what Indiana has done in this case. The Indiana Chapter expressly restrains the transfer of whatever voting rights *do* attach to shares of an Indiana "issuing public corporation," and it could not, without changing its meaning, be written in any other way.

The Indiana Chapter expressly restrains only the transfer of voting rights, but the obvious practical effect of the Control Share Chapter, in every case with which it is concerned,[16] is to delay the sale of the shares them-

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[15] A chartering state may define, create, and limit corporate voting rights in ways that affect the attractiveness of shares without triggering any question under the Commerce Clause. The Commerce Clause does not require a state to define in any particular way the bundle of rights that will be put into interstate commerce as corporate shares. To the contrary, a corporation is a mere " 'creature[] of state law' " (*Burks* v. *Lasker*, 441 U.S. 471, 478 (1979) (citations omitted)), and a share of stock has no inherent rights except those that state law and the relevant corporate documents give it. The district court's statement (CTS J.S. App. A79) that "[v]oting rights * * * [must be] an integral part of the ownership interest purchased along with a stock certificate" was quite wrong to the extent it meant that a state may not, for example, authorize nonvoting or restricted-vote stock.

[16] There can, of course, be share purchases that meet the definition of "control share acquisition" where the buyer is not interested in voting rights and thus will not be deterred by the shareholder approval provisions of the Chapter. But see Ind. Code Ann. § 23-1-42-10. The Chapter, however, is by its very terms aimed at transactions whose objective is "control." The fact that it also has an incidental impact on some transactions where the buyer is not seeking control does not alter the analysis.

selves for up to 50 days, and bar it altogether unless the "disinterested" shareholders approve it. It is entirely incorrect to say that the Control Share Chapter "has utterly no effect on any shareholder's ability to *sell* his shares" (CTS Br. 39). As the district court said, "[b]y limiting the rights that a tender offeror [or, of course, any other acquiror] can purchase in a control [share] acquisition, the Indiana Act deprives the transaction of all value and therefore blocks the transaction in practical terms as much as would a direct prohibition on control [share] acquisition[s]" (CTS J.S. App. A79).

The Commerce Clause, of its own force, prohibits state-imposed restraints on transactions in interstate commerce in the absence of a substantial state interest served by the statute. At least since this Court's decision in *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 298 (1851), it has been clear that the Commerce Clause [17] not only authorizes "'Congress to enact laws for the protection and encouragement of commerce among the states, but by its own force create[s] an area of trade free from interference by the States.'" *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 370-371 (1976) (quoting *Freeman* v. *Hewit*, 329 U.S. 249, 252

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[17] Congress is empowered, under the Commerce Clause of the Constitution, "[t]o regulate Commerce with foreign Nations, and among the several States." Art. I, § 8, Cl. 3. As the Court explained in *Hughes* v. *Oklahoma*, 441 U.S. 322, 325-326 (1979),

> [t]he few simple words of the Commerce Clause * * * reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.

See *Northeast Bancorp, Inc.* v. *Board of Governors of the Federal Reserve System*, 472 U.S. 159, 174 (1985); *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U.S. 82, 92 (1984); *H.P. Hood & Sons* v. *Du Mond*, 336 U.S. 525, 533 (1949); see also Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L.J. 425, 434-435 (1982).

(1946)); accord *Maine* v. *Taylor*, No. 85-62 (June 23, 1986), slip op. 6. There is a strong constitutional bias against direct state regulation of interstate markets. Interstate markets are generally to be left unregulated except to the extent that Congress chooses to regulate them. See *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976) (dormant Commerce Clause protects "natural functioning of the interstate market" against state "prohibition or * * * burdensome regulation").[18]

The Indiana Chapter is not saved by the fact that it expressly restrains only the transfer of voting rights and not the transfer of shares. Direct restraints obviously must be judged by the items they reach, not merely the items they name: a direct restraint on transfers of steering wheels directly restrains transfers of automobiles as well. Cf. *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, No. 84-2030 (June 3, 1986), slip op. 9 ("[t]hat the ABC Law is addressed only to sales of liquor in New York is irrelevant if the 'practical effect' of the law is to control liquor prices in

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[18] The force of these Commerce Clause principles is not, as CTS asserts (CTS Br. 35), limited to situations in which a state has discriminated against interstate commerce or has imposed burdens on interstate commerce that may be duplicative of or inconsistent with burdens placed by other states. The argument that the Commerce Clause reaches only discriminatory state action was rejected in *Freeman* v. *Hewit*, 329 U.S. at 252, 254, and the argument that state action must pose a risk of multiple and inconsistent burdens was rejected in *id.* at 256-257. In that same case, the Court made clear that the Commerce Clause applies to the sale of shares of stock, even though shares of stock are only intangible property (*id.* at 258-259). On the other hand, as we suggest below, regulation by the state of incorporation of the sale of shares of stock (which was not at issue in *Freeman* v. *Hewit*) cannot be subjected to the same Commerce Clause analysis as state regulation of sales of tangible goods. As this Court has strongly indicated in a related context, the state as creator of the corporation has powers over the movement of its stock that it would not have over the movement of tangible goods. See *State Tax Commission* v. *Aldrich*, 316 U.S. 174, 180 (1942) (upholding against Due Process Clause challenge Utah tax on transfer at death of shares of stock in Utah corporation).

other States"); *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 775 (1945).[19]

Indiana has broad authority to define the rights represented by the shares of its corporations and to define such rights in ways that may affect the value of the shares or the ease with which they may be transferred. But the Indiana Chapter does not provide that all shares, or some class of shares, of some or all Indiana corporations shall be without voting rights. Instead, Indiana has declared that whatever voting rights the corporate articles and bylaws confer may not be transferred in a "control share acquisition" except under specified conditions. The meaning of the Indiana Chapter cannot be explained without reference to the transactions that it restrains, and its effect is not to provide a general rule applicable to whatever persons hold or acquire shares but to protect whatever pattern of voting power (and, consequently, share ownership) exists in a given corporation at a given time against transactions that would alter the pattern. When a share of stock defined under Indiana law to represent certain rights has lawfully entered the national marketplace in securities, Indiana may not, under the Commerce Clause, directly restrain its further transfer in the absence of a substantial state interest.[20] The Indiana Chapter is such a direct restraint.

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[19] The Court has repeatedly stated that "[t]he principal focus of inquiry [under the Commerce Clause] must be the practical operation of the [state] statute, since the validity of state laws must be judged chiefly in terms of their probable effects." *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 37 (1980); see *Hughes* v. *Oklahoma*, 441 U.S. 322, 336 (1979); *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 354 (1951). This is not to say that every statute with an impact on a shareholder's ability to sell his shares is unconstitutional, or even requires any particular Commerce Clause scrutiny. But where a statute directly restrains the transfer of voting rights and the obvious practical effect of that bar is to restrain transfers of shares as well, the statute must be judged by its practical as well as its literal effects.

[20] This point does not depend on an assessment of the impact of the Control Share Chapter on economic efficiency. In *MITE* (457 U.S. at 643-644), the Court observed that economic efficiency is

### B. The Broad Power Of A Chartering State To Govern The Internal Affairs And Protect The Shareholders Of Its Corporations Does Not Save The Indiana Chapter

While some of this Court's opinions have suggested that "direct" regulation of interstate commerce is unconstitutional without further inquiry (see, *e.g.*, *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, No. 84-2030 (June 3, 1986), slip op. 5; *MITE*, 457 U.S. at 640 (plurality opinion); *Shafer* v. *Farmers Grain Co.*, 268 U.S. 189, 199 (1925)), the Court has in other cases suggested that the label "direct" does not always end the inquiry but instead exposes a statute to "more demanding scrutiny." *Maine v. Taylor*, No. 85-62 (June 23, 1986), slip op. 7. See *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Commission*, 461 U.S. 375, 390 (1983). At bottom, "the critical consideration is the overall effect of the statute on both local and interstate activity" (*Brown-Forman*, slip op. 5 (citing *Raymond Motor Transportation, Inc.* v. *Rice*, 434 U.S. 429, 440-441 (1978))). Just last Term, for example, in *Maine* v. *Taylor*, *supra*, the Court upheld a ban on fish importation that discriminates on its face against interstate commerce on the ground that importa-

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poorly served by regulation that impedes takeovers. In the present case, the court of appeals (CTS J.S. App. A25) ruled that the Indiana statute is vulnerable to economic attack on the same grounds as the Illinois statute struck down in *MITE*. Cf. R. Winter, *Government and the Corporation* 42-44 (1978) (although economic efficiency is generally best served by allowing states broad latitude to enact corporation legislation, including even legislation that seems in isolation to run counter to the interests of efficiency, antitakeover legislation is an exception to that general rule). On the other hand, there are economic arguments that might be thought to support the Indiana legislation from an efficiency standpoint (see Indiana Br. 91-97, 100-101). The Constitution does not dictate that states, when acting within their proper spheres, act in accordance with any particular theory of economic efficiency, or that they pursue economic efficiency at all. The question in this case is whether the State of Indiana has acted within a proper sphere.

tion posed "significant threats to Maine's unique and fragile fisheries" that could not be otherwise countered. Slip op. 9-10 (footnote omitted).

An older example of a permissible state restraint on commerce is state blue sky laws, which typically prohibit the sale of securities into the regulating state or to its residents except on specified conditions. These statutes have been upheld as valid measures to protect a state's residents against fraud and other evils in the sale of securities, notwithstanding what the Court saw as an incidental effect on interstate commerce. *Hall* v. *Geiger-Jones Co.*, 242 U.S. 539, 554-556 (1917); *Merrick* v. *N.W. Halsey & Co.*, 242 U.S. 568, 590 (1917); *Caldwell* v. *Sioux Falls Stock Yards Co.*, 242 U.S. 559, 564-566 (1917). See *MITE*, 457 U.S. at 641 (plurality opinion); see also Loss, *The Conflict of Laws and the Blue Sky Laws*, 71 Harv. L. Rev. 209, 241-253 (1957).[21]

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[21] While blue sky laws plainly affect interstate commerce, they differ from statutes like the Indiana Chapter in that they seek to protect state residents from a palpable harm to them from transactions with them that take place within the enacting state. One commentator points out that, "[u]nlike blue-sky laws, * * * which cover only intrastate transactions, takeover statutes reach tender offers, *wherever made*, if the target corporation, *not the transaction*, has certain contacts with the state." Kozyris, *Corporate Wars and Choice of Law*, 1985 Duke L.J. 1, 36 (footnote omitted); see Oldham, *Regulating the Regulators: Limitations upon a State's Ability to Regulate Corporations with Multistate Contacts*, 5 Del. J. Corp. L. 181, 242 (1980) (state tender-offer statutes, which "purport to govern offers made to shareholders regardless where domiciled," are "obviously more expansive than normal blue sky laws, which are limited to offers made to shareholders who reside in the state").

Contrary to CTS's contention (Br. 11-12, 34, 47), it is the blue sky cases rather than this case that resemble *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117 (1978) (upholding Maryland's prohibition of ownership of retail service stations by gasoline producers and refiners). Like the law upheld in *Exxon* and unlike the Control Share Chapter in this case, blue sky laws regulate transactions that occur in the regulating state, and their interstate repercussions, although they indisputably exist, are indirect. This case, unlike *Exxon* and the blue sky cases, involves out-of-state transactions.

Appellants advance two reasons why the Control Share Chapter should be considered a legitimate form of state regulation.[22] First, the State asserts a general interest in regulating the "internal affairs" or "corporate governance" of Indiana corporations, and CTS appears to agree (Indiana Br. 81-86; see CTS Br. 39-40 & n.19). Second, both appellants argue that "[t]he Chapter serves the legitimate State interest of protecting non-dominant shareholders in Indiana corporations by allowing them to vote on a fundamental change in the corporation—its transformation from a company owned by scattered shareholders to one controlled by a single dominant shareholder" (CTS Br. 11; accord *id.* at 25, 37-38; Indiana Br. 88).

A chartering state does have a legitimate and substantial interest in governing the "internal affairs" of its corporations, including the rights of shareholders *vis-à-vis* the corporation itself, its directors and officers, and fellow shareholders. And having defined the rights of shareholders, a chartering state has an important and legitimate interest in protecting those rights with respect to all shareholders, resident and nonresident alike. A nonresident who buys shares in an Indiana corporation accepts that state's definition of his rights and buys that state's protection. See generally Buxbaum, *Federalism*

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[22] The state alone suggests a third interest, a "strong interest in the welfare of employees of Indiana corporations with headquarters, factories or other operations in the State"; it argues that shareholders accordingly should be able to block a control share acquisition on the basis of "possible removal [of the corporation or its assets] from the State" (Indiana Br. 89-90). This asserted interest requires no extended discussion. If the dormant Commerce Clause means anything at all, it means that a state may not justify legislation on the ground that an impairment of commerce is necessary to prevent economic forces from moving resources out of that state and into another. See Levmore, *Interstate Exploitation and Judicial Intervention*, 69 Va. L. Rev. 563, 623-624 & n.240 (1983); Sargent, *Do the Second-Generation State Takeover Statutes Violate the Commerce Clause?*, 8 Corp. L. Rev. 3, 31 (1985); Note, *Securities Laws and the Constitution: State Tender Offer Statutes Reconsidered*, 88 Yale L.J. 510, 528 (1979).

*and Company Law*, 82 Mich. L. Rev. 1163, 1167 (1984); Levmore, *supra*, 69 Va. L. Rev. at 624.[23]

A chartering state's governance of the internal affairs of its corporations, including its definition of the rights of shareholders, obviously affects interstate commerce. Indeed, whenever the corporation then sells shares in interstate commerce, the chartering state may be said to be projecting its law beyond its borders.[24] Accordingly, much of corporation law properly comes within an

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[23] In particular, in the absence of congressional action, it is a task for the state to define and enforce the fiduciary obligations of directors, officers, and controlling shareholders in connection with a tender offer. See *Schreiber* v. *Burlington Northern, Inc.*, 472 U.S. 1 (1985); cf. *Santa Fe Industries* v. *Green*, 430 U.S. 462 (1977); see also *Panter* v. *Marshall Field & Co.*, 646 F.2d 271 (7th Cir.), cert. denied, 454 U.S. 1092 (1981). See generally *Burks* v. *Lasker*, 441 U.S. 471 (1979). The Commerce Clause plainly does not *require* a state to enact legislation (or interpret its common law or legislation) to force corporate management to exercise its fiduciary duties in any particular way, a point the court of appeals made in a later chapter of this case. *Dynamics Corp. of America* v. *CTS Corp.*, 805 F.2d 705, 718 (7th Cir. 1986); see also CTS J.S. App. A10 (validity of "poison pills" is "a matter committed to the authority of the states"). The dormant Commerce Clause is a reservation to Congress of the exclusive right to legislate in certain ways affecting interstate commerce; it is not a command to states to legislate or adjudicate in any particular way.

[24] The traditional state-law provisions that appellants claim are threatened by the decision below all clearly relate to internal affairs and are clearly constitutional notwithstanding the fact that they are projected beyond the state's borders whenever the corporation sells shares in interstate commerce. For example, "the scheduling and voting methods for electing directors" and "restrictions on freeze-out or back-end mergers that may injure minority shareholders" (CTS Br. 49) relate, respectively, to corporate governance and to merger transactions to which the corporation itself is a party. These are legitimate matters of state regulation notwithstanding effects on the attractiveness of shares and consequent effects on transactions in those shares in interstate commerce. Similarly, a state statute that authorizes cumulative voting or staggered terms for directors of corporations incorporated in that state relates directly to corporate governance and raises no question under the Commerce Clause merely because it may make the shares more or less attractive.

exception to the principle that a state may not "project its legislation into" other states (*Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935); *Brown-Forman*, slip op. 8-9), for the very placement of a security into interstate commerce is a projection of legislation into the home states of those who choose to buy the security.[25]

Moreover, the "internal affairs" of a corporation, including the rights of shareholders, of course comprise many matters that may bear on transactions in its shares. A few states have imposed on insiders a state-law fiduciary duty to the corporation or its shareholders not to sell or buy shares on the basis of undisclosed "inside information." [26] Controlling shareholders have a duty, at least in some states, not to sell control to a buyer who could be expected to loot the corporation.[27]

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[25] Indeed, the application of a single state's law to the rights associated with a share of stock, wherever situated, contributes to the free flow of commerce in shares of stock. See *MITE*, 457 U.S. at 645 (opinion of the Court) (noting that "internal affairs doctrine," as a conflict-of-laws principle, fosters certainty in corporate relationships). This Court has observed that,

> as a general matter, the law of the state of incorporation normally determines issues relating to the *internal* affairs of a corporation. Application of that body of law achieves the need for certainty and predictability of result while generally protecting the justified expectations of parties with interests in the corporation.

*First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 621 (1983); see also *Cort* v. *Ash*, 422 U.S. 66 (1975).

[26] See *Polin* v. *Conductron Corp.*, 552 F.2d 797, 810-811 (8th Cir.) (Delaware law), cert. denied, 434 U.S. 857 (1977); *Thomas* v. *Roblin Industries*, 520 F.2d 1393, 1397 (3d Cir. 1975) (Delaware law); *Davidge* v. *White*, 377 F. Supp. 1084, 1089 (S.D.N.Y. 1974) (Delaware law); *Diamond* v. *Oreamuno*, 24 N.Y.2d 494, 248 N.E.2d 910, 301 N.Y.S.2d 78 (1969); see also *Dirks* v. *SEC*, 463 U.S. 646, 672 (1983) (Blackmun, J., dissenting). But see *Freeman* v. *Decio*, 584 F.2d 186 (7th Cir. 1978) (Indiana law); *Schein* v. *Chasen*, 313 So. 2d 739, 746 (Fla. 1975). See generally Note, *Common Law Corporate Recovery for Trading on Non-Public Information*, 74 Colum. L. Rev. 269 (1974).

[27] See, *e.g.*, *Doleman* v. *Meiji Mutual Life Insurance Co.*, 727 F.2d 1480, 1483-1484 (9th Cir. 1984); *McDaniel* v. *Painter*, 418

And of course "internal affairs" also include the roles played by directors, shareholders, and others in approving or disapproving transactions between the corporation itself and other persons, including merger and acquisition transactions to which the corporation is a party.[28]

The question in this case is whether the Indiana Chapter *does* constitute regulation of "internal affairs." In *MITE*, the Court said that stock transactions between corporate shareholders and third parties do not "themselves" come under the heading "internal affairs." See

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F.2d 545, 547-548 (10th Cir. 1969); *Insuranshares Corp.* v. *Northern Fiscal Corp.*, 35 F. Supp. 22 (E.D. Pa. 1940); *Ritchie* v. *McGrath*, 1 Kan. App. 2d 481, 486-488, 571 P.2d 17, 22 (1977); *Gerdes* v. *Reynolds*, 28 N.Y.S.2d 622, 652 (Sup. Ct. 1941); *Thompson* v. *Hambrick*, 508 S.W.2d 949, 953 (Tex. Civ. App. 1974), writ ref'd n.r.e; *Glass* v. *Glass*, 228 Va. 39, 47-48, 321 S.E.2d 69, 74 (1984). The chartering state can, of course, prohibit looting, and these cases impose liability on a shareholder who has abetted the looter. Cf. *Perlman* v. *Feldmann*, 219 F.2d 173, 179 (2d Cir. 1955) (Swan, J., dissenting) (knowledge or reasonable suspicion that buyer will loot the corporation "will terminate the dominant shareholder's privilege to sell and will create a duty not to transfer the power of management to such purchaser. The duty seems to me to resemble the obligation which everyone is under not to assist another to commit a tort rather than the obligation of a fiduciary.").

[28] Mergers and other "fundamental changes" that generally require shareholder approval are changes in the very structure of the corporation, and are accordingly an "internal" matter of legitimate interest to the state under the internal affairs doctrine. See *Fleet Aerospace Corp.* v. *Holderman*, 637 F. Supp. 742, 746 (S.D. Ohio), aff'd, 796 F.2d 135 (6th Cir. 1986), appeal pending *sub nom. Ohio* v. *Fleet Aerospace*, No. 86-344; *Gelco Corp.* v. *Coniston Partners*, Civ. No. 3-86-847 (D. Minn. Nov. 10, 1986). As one commentator has noted, "acquisitions of stock under a tender offer do not in themselves alter the corporate structure, procedures, and relationships, nor do they necessarily lead to a structural change; the acquirer may be content with control at the shareholder level. Furthermore, the tender offeror need not be a shareholder and the accepting offeree ceases to be one." Kozyris, *supra* note 21, 1985 Duke L.J. at 36-37 (footnote omitted). Any changes that an offeror making a control share acquisition *does* seek to make in the structure of the corporation are matters of internal affairs, and the state can require that shareholder approval be sought. See Ind. Code Ann. §§ 23-1-40-3, 23-1-41-2, 23-1-45-2.

*MITE*, 457 U.S. at 645 (opinion of the Court) ("Tender offers contemplate transfers of stock by stockholders to a third party and do not themselves implicate the internal affairs of the target company.").[29] Illinois could not, the Court held, treat interstate commerce in shares of a public corporation as an internal matter and impose restraints on transactions between shareholders and third parties in the national securities marketplace. But, it is argued, the Illinois statute at issue in *MITE* was concededly a restraint on a class of interstate transactions —tender offers—whereas the Indiana Chapter, while it refers to a class of transactions (control share acquisitions) does not purport to bar transactions in shares but only to govern voting rights (normally an internal matter) in light of them. The Indiana Act cannot, however, be understood as an act merely defining voting rights. It is written as a restraint on the *transferability* of voting rights in specified transactions, and it could not be written in any other way without changing its meaning. Since the restraint on the transfer of voting rights is a restraint on the transfer of shares, the Indiana Chapter, like the Illinois Act, restrains "transfers of stock by stockholders to a third party."

Indiana argues that, by conferring the right to block the transfer on the shareholders themselves, rather than

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[29] Accord *Great Western United Corp.* v. *Kidwell*, 577 F.2d 1256, 1280 n.53 (5th Cir. 1978), rev'd on venue grounds *sub nom. Leroy* v. *Great Western United Corp.*, 443 U.S. 173 (1979); see also *Restatement (Second) of Conflicts of Laws* § 302 comment e, at 310 (1971) (citing the transfer of stock as an example of matters that are not within the scope of "internal affairs regulation"); E. Aranow, H. Einhorn & G. Berlstein, *supra*, at 230; Wilner & Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 Fordham L. Rev. 1, 17 (1976) (footnote omitted) ("[A] multistate tender offer has nothing to do with internal corporate procedures. Although transfer of control is the goal * * * it is accomplished in a tender offer without reference to the legal attributes of the domestic corporation. Hence, regardless of purpose, state regulation of an offer aimed at a domestic target is arguably unjustifiable, at least under the 'internal affairs' doctrine.").

a state official, it has created a scheme that is valid notwithstanding *MITE*. To put the argument in what we think is its strongest form, Indiana says that what it has done is to confer on all shareholders the right to participate in deciding whether the corporation in which they have invested goes from having (to use the current case as an example) a 9.6% shareholder to having a 27.5% shareholder. This argument is not without force, particularly since Indiana is quite correct that other shareholders may have a genuine interest in that transaction.[30]

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[30] Shareholders may, of course, also benefit from transactions meeting the definition of "control share acquisition," and the procedures Indiana has required may deter bidders from entering into transactions that shareholders would favor. There has been a lively debate about whether measures that make takeover bids harder to accomplish harm shareholders in all cases. See, *e.g.*, Easterbrook & Fischel, *Auctions and Sunk Costs in Tender Offers*, 35 Stan. L. Rev. 1 (1982); Easterbrook & Fischel, *Corporate Control Transactions*, 91 Yale L.J. 698 (1982); Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 Harv. L. Rev. 1161 (1981); Manne, *Mergers and the Market for Corporate Control*, 73 J. Pol. Econ. 110 (1965); Ruback, *Assessing Competition in the Market for Corporate Acquisitions*, 11 J. Fin. Econ. 141 (1985) (all critical of defensive tactics); Bebchuk, *The Case for Facilitating Competing Tender Offers*, 95 Harv. L. Rev. 1028 (1982); Bebchuk, *The Case for Facilitating Competing Tender Offers: A Reply and Extension*, 35 Stan. L. Rev. 23 (1982) (some defensive tactics that lead to "auctions" are desirable, although author is generally in agreement with Easterbrook/Fischel objections to defensive tactics); Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 Stan. L. Rev. 819 (1981); Gilson, *Seeking Competitive Bids Versus Pure Passivity in Tender Offer Defense*, 35 Stan. L. Rev. 51 (1982) (same); Bradley & Rosenzweig, *Defensive Stock Repurchases*, 99 Harv. L. Rev. 1377 (1986) (some properly regulated defensive stock repurchases promote shareholder welfare); Lowenstein, *Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation*, 83 Colum. L. Rev. 249 (1983) (arguing that both improper defensive tactics and coercive takeover tactics require legislative correction); Carney, *Shareholder Coordination Costs, Shark Repellents, and Takeout Mergers: The Case Against Fiduciary Duties*, 1983 Am. B. Found. Res. J. 341 (arguing that tender offers are often used by raiders

We think the Court should nevertheless reject this argument, on the ground that a state may not give shareholders of a public corporation the right to preserve the present pattern of share ownership against the operation of interstate commerce. An Indiana corporation whose shares are traded in the national securities marketplace remains a creature of Indiana law: many of its important attributes are determined by state law and are subject to modification by the state. But one of its important attributes, the identity of its shareowners and the size of their holdings, is (by virtue of the interstate sale of shares that Indiana allowed in the first place) a function of interstate commerce. An Indiana "public" corporation has, virtually by definition, raised capital by selling shares into the national securities marketplace. Raising capital in that manner is possible in part because that national marketplace enables shareowners to resell, and generally to trade in securities, in transactions determined by market forces, subject only to such regulation as Congress chooses to impose. Protecting that national market from intrusive state regulation is close to the heart of what the Commerce Clause is about.

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to expropriate the wealth of target shareholders); Lipton, *Takeover Bids in the Target's Boardroom*, 35 Bus. Law. 101 (1979); Lipton, *Takeover Bids in the Target's Boardroom: A Response to Professors Easterbrook and Fischel*, 55 N.Y.U. L. Rev. 1231 (1980); Lipton, *Takeover Bids in the Target's Boardroom: An Update After One Year*, 36 Bus. Law. 1017 (1981) (same). It has also been suggested that state antitakeover measures are more likely to have been enacted in order to protect incumbent management than to protect shareholders. See, *e.g.*, Winter, *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. Legal Studies 251, 268 (1977); Langevoort, *State Tender-Offer Legislation: Interests, Effects, and Political Competency*, 62 Cornell L. Rev. 213, 238-240 (1977); Loss, Foreword to Symposium, *Controlling Corporate Takeover Bids: State Regulation and the Ohio Approach*, 21 Case W. Res. L. Rev. 605, 609, 611 (1970). The court of appeals in this case engaged in second-guessing of the Indiana legislature on these issues. We think that was not the appropriate course, and that this Court's decision should not rest on a substitution of its judgment for that of the State of Indiana on where the best interests of shareholders lie.

## CONCLUSION

The judgment of the court of appeals should be affirmed insofar as it rests on the ground that the Control Share Chapter is invalid under the Commerce Clause.

Respectfully submitted.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

CTS CORPORATION,
*Appellant,*

v.

DYNAMICS CORPORATION OF AMERICA,
*Appellee.*

STATE OF INDIANA,
*Intervenor-Appellant,*

v.

DYNAMICS CORPORATION OF AMERICA,
*Appellee.*

**On Appeal From The United States Court Of Appeals For The Seventh Circuit**

## BRIEF AMICUS CURIAE OF UNITED SHAREHOLDERS ASSOCIATION IN SUPPORT OF APPELLEE

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## MISCELLANEOUS

T. Boone Pickens United Shareholders Association (hereinafter "United Shareholders Association") respectfully submits this brief, with the consent of the parties, as Amicus Curiae in support of Appellee, Dynamics Corporation of America, to urge the Court to affirm the decision by the United States Court of Appeals for the Seventh Circuit which held that portions of the Indiana Business Corporation Law were unconstitutional under the Supremacy Clause and the Commerce Clause.

## INTEREST OF AMICUS CURIAE

*Amicus Curiae* United Shareholders Association is a non-profit corporation organized and operated to:

(1) promote the welfare of the citizens of the United States of America by supporting the dissemination of ideas and actively encouraging legislative, regulatory, corporate and/or public reform in order to create lasting economic property and bolster the economic competitiveness of American business through the increased responsiveness and accountability of corporate management to shareholders;

(2) promote the public welfare by serving as an advocate before the general and shareholder public for the promotion of responsive, democratic corporate governance;

(3) heighten public awareness in the fields of responsible corporate governance and stockholders rights and the detrimental social and macroeconomic effects of the lack of responsive corporate governance; and

(4) further the ideals of responsible corporate governance and stockholders rights through the encouragement of the democratic operation of American business.

United Shareholders Association has an interest in this appeal because this Court's decision will have broad ramifications for all shareholders wishing to exercise their prerogative to participate in interstate transactions and to cast their individual votes in matters of corporate governance. The central issue presented to this Court is whether or not a state, cloaking itself in the veil of the regulation of corporate internal affairs, may delegate to incumbent corporate management the power to regulate significant interstate commercial transactions. The state cannot constitutionally exercise this power in its own right, yet it would authorize incumbent management to wield extensive powers directly affecting national markets. This deputization significantly interferes with interstate commercial transactions and subjects the individual shareholder to the tyranny of a management-controlled minority.

In contrast to those actions which are truly "internal" to the corporation, the individual shareholder here has no remedy for the actions management takes in compliance with the Indiana Control Share Acquisitions Chapter.[1] Thus, management and a few shareholders sympathetic to management are empowered to strip valuable property rights, the ability to tender shares with voting rights intact, from a target company's shareholders at the very moment that those rights attain their highest value for the shareholder.

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1. Ind. Code Ann. §§ 23-1-42-1 to 11 (Burns Cum. Supp. 1986) (the "Control Share Chapter" or the "Chapter"). In matters of legitimate "internal affairs" a breach of fiduciary duty by management can be called into question by a derivative action brought by a shareholder on behalf of the corporation.

## THE INDIANA CONTROL SHARE ACQUISITIONS CHAPTER

A summary of the relevant provisions of the Control Share Chapter is necessary in order for this Court to assess its deleterious effect upon significant interstate transactions and its obvious ability to frustrate the policies of the Williams Act.

Once a corporation has opted into the Chapter, the shares of that corporation acquired by a party in excess of certain ownership thresholds[2] are automatically stripped of their voting rights. Voting rights reattach *only* after completion of a process completely controlled by management.

If an acquiring person wishes to regain the voting rights ordinarily attendant to the excluded shares, he may request a shareholder meeting *and* undertake to pay the corporation's expenses at such special meeting. Within ten (10) days thereafter the incumbent directors must call a special meeting to be held *within fifty (50) days* after receipt of the request.[3] Management is not required to hold the special meeting before the scheduled expiration of any proposed tender offer and there is no provision allowing the offeror to accelerate the meeting. Similarly, no provision is made to bar the target corpora-

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2. § 23-1-42-1. "*'Control shares' defined*": " 'control shares' means shares that . . . when added to all other shares . . . owned by a person or in respect to which that person may exercise or direct the exercise of voting power, would entitle that person . . . to exercise or direct the exercise of the voting power of the . . . corporation . . . within any of the following ranges of voting power: (1) One-fifth (1/5) or more but less than one-third (1/3) of all voting power. (2) One-third (1/3) or more but less than a majority of all voting power. (3) A majority or more of all voting power."

3. § 23-1-42-7. *"Shareholder meeting to determine control share voting rights."*

tion from taking defensive steps during the waiting period.[4] If no special meeting is requested, the voting rights to be accorded the shares acquired will be decided at the next special or annual meeting of shareholders.[5]

It is management's sole responsibility to prepare and take a position on a voting rights resolution, and to present the resolution to the shareholders.[6] The notice of the shareholder meeting is to include:

(i) a copy of the acquiring person's statement;

(ii) a statement by the Board of Directors of the corporation of its position or recommendation.[7]

No provision is made for any statement by, or solicitation on behalf of, the acquiring person.

Thus, fused upon the tender offer process is a proxy contest, with its potential for additional delay. Moreover, it is a proxy contest in which only the cossetted domestic corporation may solicit proxies. *Any proxies obtained by*

4. "According to the Securities & Exchange Commission, delay enables a target company to: (1) repurchase its own securities; (2) announce dividend increases or stock splits; (3) issue additional shares of stock; (4) acquire other companies to produce an antitrust violation should the tender offer succeed; (5) arrange a defensive merger [target initiated transactions are specifically exempted from the Control Share Chapter. § 23-1-42-2(e)]; (6) enter into restrictive loan agreements; (7) institute litigation challenging the tender offer." *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6th Cir. 1982) (quoting *Edgar v. MITE Corp.*, 457 U.S. at 637 n.13, 102 S. Ct. at 2638, n.13). Additional defenses such as the increasingly popular "poison pills" are equally available to incumbent management.

5. § 23-1-42-7(c). *"Shareholder meeting to determine control share voting rights."*

6. § 23-1-42-7. *"Shareholder meeting to determine control share voting rights."* § 23-1-42-8. *"Notice of shareholder meeting."*

7. § 23-1-42-8. *"Notice of shareholder meeting."*

*the acquiring person in support of the voting resolution fall within the definition of "interested share(s)," and are automatically stripped of voting rights.*[8]

To pass, the voting resolution must be approved by:

(i) a majority of all shares; *and*

(ii) a majority of all *"disinterested"* shares.[9]

No deadline is imposed by the statute for the tallying of the shareholder vote, allowing management to further prolong the process beyond the fifty (50) day delay already provided management by the Control Share Chapter.

Voting rights reattach only to the extent granted by the resolution. If the resolution fails or if the acquiring person elects not to file an acquiring person's statement, the corporation may redeem the control shares at a "fair value thereof pursuant to the procedures adopted by the corporation."[10]

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8. § 23-1-42-3. "*'Interested shares' defined.*" ". . . '[I]nterested shares' means the shares of an issuing public corporation in respect of which [an acquiring person] *may exercise or direct the exercise* of the voting power of the corporation. . . ."

*Read literally, the Chapter precludes not only uninvited tender offers but also proxy contests where the number of proxies obtained exceeds the statutory thresholds.*

9. § 23-1-42-9. *"Resolution granting control share voting rights."* Unable to vote are those shares held by the acquiring person, officers of the corporation and any employees who are also directors. Those shares held by outside directors, who are clearly "interested" in any contest for control, are not excluded.

10. § 23-1-42-10-(a). *"Redemption of control shares."* Contrast to § 23-1-42-11(c), *"Rights of dissenting shareholders"* in which the fair value for the dissenting shareholder is defined as a value not less than the highest price paid per share by the acquiring person in a control share acquisition. No similar definition of fair value is included in Section 23-1-42-10, *"Redemption of control shares."* Instead, fair value is that value determined by the corporation.

## SUMMARY OF ARGUMENT

Acting out of an excess of protectionistic zeal and in an effort to avoid this Court's decision in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), numerous state legislatures have rushed to enact second-generation takeover statutes,[11] of which the subject Control Share Chapter is but one example.[12] The impulse giving rise to such second-generation statutes, a putative interest in protecting local jobs and industry, constitutes exactly that type of economic isolationism and parochialism prohibited by the Commerce Clause of the United States Constitution. U.S. Const., art. I, § 8, cl. 3. Moreover, the second-generation statutes clash with and frustrate the Congressional policies embodied in the Williams Act, 15 U.S.C. §§ 78m (d)-(e), 78n(d)-(f), and thus violate the Supremacy Clause, U.S. Const., art. VI, cl. 2.

A statute that ostensibly regulates one type of transaction, but whose practical effect is to discourage or to interfere with another, must be tested for both Supremacy Clause and Commerce Clause purposes as though it regulated both transactions. That the inhibiting impact of the second-generation statutes arises out

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11. *Control Share Acquisition Statutes*: Hawaii, Indiana, Maine, Minnesota, Missouri, Ohio, Pennsylvania and Utah.

*Fair price legislation*: Connecticut, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, New Jersey, New York, Pennsylvania, Virginia, Washington and Wisconsin.

12. The Control Share Chapter was passed in response to bids by nonresidents for two large Indiana corporations. 3 *Corporate Control Alert* 1, 10-11 (March 1986) (App. 141-142).

> When asked why Indiana had decided to adopt such a virulent statute, James Strain, an Indianapolis corporate lawyer from Barnes & Thornburg [counsel for Appellant CTS] said "We don't like having all our companies taken over by East Coast firms." On further reflection, Strain says Midwestern and West Coast acquirprs are no better.

3 *Corporate Control Alert* 1, 10 (March 1986) (App. 141).

of practical impossibility and increased transaction costs rather than from an outright prohibition does not redress the imbalance, one at odds with the neutral position of the Williams Act. That the impact of the legislation flows from the regulation of voting rights after a control share acquisition, the "back end" of the transaction, rather than direct regulation of the offer, is constitutionally insignificant.

The Chapter was designed, drafted and intended to insulate Indiana corporations from the interstate market for corporate control.[13] The statute comes into play even if the tender offeror, the management of the target company and ninety percent of the company's shareholders are non-residents of Indiana.[14] The Commerce Clause ramifications are obvious. Out-of-state management of an Indiana corporation is permitted to strip the voting rights from shares tendered by out-of-state shareholders to an out-of-state offeror in response to a nationwide tender offer.

Unlike the Minnesota Act upheld in *Cardiff Acquisitions, Inc. v. Hatch*, 751 F.2d 906 (8th Cir. 1984), the Indiana Control Share Chapter is not closely tailored to advance the legitimate interests of Indiana. The dramatic sweep of the Chapter is exemplified by the fact that an individual residing in New York could not sell a twenty percent interest in an Indiana corporation to a California

13. See footnote 12, *supra*.

14. The percentage of non-resident shareholders could be much higher. By its terms, the Chapter applies if 10,000 Indiana residents hold shares in the company. CTS Corporation has 5,700,000 shares outstanding. If 10,000 Indiana residents each owned one share, the ownership of roughly .176% of the stock by Indiana residents would trigger the application of the Chapter. Indiana would then hold the interstate market for corporate control captive even though 99.824% of the shares were held by non-Indiana residents.

resident without being subject to the Chapter. That single sale, if the purchaser required that the shares be attended by voting rights, would require that the potential buyer file an acquiring person statement, request a special shareholder meeting, undertake to pay the expenses incurred in connection with such a meeting and then await the passage of fifty days (or more) for shareholder approval. The effect of the legislation upon interstate commercial activity is direct;[15] it is intended; it is substantial.

By its introduction of significant, indeed almost limitless, delay into the tender offer process, and its superimposition of a completely one-sided proxy contest upon the endeavor, the Chapter clashes directly with the Williams Act, decidedly tipping the scales in favor of the target corporation and its incumbent management and providing them with potent advantages with which to frustrate the pro-competitive effects of the tender offer effort.

The decision to take advantage of an offer, to receive a control premium for his or her shares, is no longer the independent economic decision of the individual shareholder. Instead, the investor is bound by the collective decision of the "disinterested" shareholders of the target company, presumably those who have not tendered and who are adverse to the offer. To this extent the Control Share Chapter offers illusory investor protection at the expense of investor autonomy.[16] If allowed to stand, this and similar legislation would lead inexorably to a Balkanization of the Nation's corporate economy.

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15. Indiana concedes the direct impact of the statute upon tender offers by its extended discussion of alternative strategies foisted upon offerors. Brief of Intervenor-Appellant State of Indiana, pp. 63-68.

16. *Edgar v. MITE Corp.*, 457 U.S. at 639-640.

## ARGUMENT

### I. THE INDIANA CONTROL SHARE ACQUISITION CHAPTER VIOLATES THE COMMERCE CLAUSE.

The Control Share Chapter should be struck down as violative of the Commerce Clause. The Chapter's "avowed purpose" and "necessary tendency"[17] is to directly and substantially interfere with the interstate market for corporate control. The statute also violates the Commerce Clause by placing burdens upon interstate commerce which far outweigh the local benefits it purports to advance.

#### A. The Commerce Clause is Designed to Prevent the Balkanization of the Union and Prohibits Indiana from Regulating Interstate Commerce.

Through the years, this Court has been guided in its interpretation of the Commerce Clause by the basic principle that "our economic unit is the Nation." *H. P. Hood & Sons, Inc. v. Du Mond,* 336 U.S. 525, 537 (1949). While some interference with the national economy may be tolerated when a state secures a cleaner, healthier, safer environment for its citizens,[18] this Court has often noted that simple economic protectionism is subject to a virtually *per se* rule of invalidity. *See, e.g., City of Philadelphia v. New Jersey,* 437 U.S. 617, 624 (1978).

Naturally, it is the rare state statute that boldly proclaims its purpose to be the advancement of parochial

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17. *Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. 511, 522 (1935).

18. Even in these areas of traditional local concern, however, the Court will accord less deference to the legislative judgment, "where the local regulation bears disproportionately on out-of-state residents and businesses." *Kassel v. Consolidated Freightways Corp. of Delaware,* 450 U.S. 662, 675-76 (1981).

local interests via direct discrimination against interstate commerce. However, a finding that state legislation constitutes "economic protectionism" may be made on the basis of either discriminatory purpose or discriminatory effect. *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263, ____, 104 S. Ct. 3049, 3055 (1984); *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 471 (1981). In analyzing state *economic* regulation under the Commerce Clause, the key consideration is the overall effect of the state law on both local and interstate activity. *Brown-Forman Distillers Corp. v. New York State Liquor Authority,* ____U.S.____, 106 S. Ct. 2080, 2084 (1986).

With the Control Share Chapter, Indiana has declared that *its* economic unit is Indiana. The state's avowed purpose is to "shield[] in-state industries from out-of-state competition," *Maine v. Taylor,* ____U.S.____, 106 S. Ct. 2440, 2453 (1986); the statute's natural tendency is to significantly depress the market for control of Indiana corporations.[19]

### B. The Control Share Chapter Should be Struck Down as a Direct Violation of the Commerce Clause.

In *Brown-Forman, supra,* the Supreme Court reaffirmed that it has adopted a two-tiered approach to analyzing state economic regulation under the Commerce Clause.

> When a state statute directly regulates or discriminates against interstate commerce, *or when its effect is to favor in-state economic interests over out-of-state interests,* we have generally struck down the

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19. Needless to say, if this statute is valid, many or all of the other forty-nine (49) states will be pressured to enact similar legislation, in order to appease management of *their* domestic corporations. *See Edgar v. MITE Corp.,* 457 U.S. at 642.

> statute without further inquiry. . . . When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. . . .

*Brown-Forman,* 106 S. Ct. at 2084 (emphasis supplied).

While artfully drafted to avoid a simple comparison with the Illinois statute struck down in *Edgar v. MITE Corp.,* 457 U.S. 624 (1982), the Chapter is designed to directly regulate the interstate market for corporate control. This statute does not merely make it slightly more cumbersome for an uninvited suitor to take control of an Indiana corporation. Instead, the state has "overtly moved to slow or freeze the flow of commerce for protectionist reasons." *Philadelphia v. New Jersey,* 437 U.S. at 628. That Indiana deputizes the party most likely to obstruct interstate commerce to perform the interfering acts does not alter the analysis. To allow such a subterfuge to pass muster would be to glorify form over substance and "invite[] facile evasions of the [Commerce C]lause." *Dynamics Corp. of America v. CTS Corp.,* 794 F.2d 250, 264 (7th Cir. 1986).

The purpose of this statute is crystal clear. The origins of the statute[20] and the admissions made throughout the Brief of the State of Indiana show its true purpose: the shielding of Indiana corporations, Indiana jobs and Indiana industry from the effects of the interestate marketplace for corporate control.

Additionally, the Chapter effectively stymies tender offers for shares of Indiana corporations by forcing ac-

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20. See footnote 12, *supra*.

quiring persons to overcome immense hurdles if they wish to exercise the most basic right adherent to their ownership interest in the corporation, the right to vote. The Chapter applies even though the acquiring person, the offerees and incumbent management are all non-residents of Indiana; it applies even though the corporation is headquartered outside of Indiana; it applies even though ninety percent (or more) of the shareholders reside outside Indiana; it applies if a hostile tender offer is commenced; and, it applies when a Florida owner of twenty percent of an Indiana corporation wishes to sell his shares to an Alaska purchaser. The practical effect of the Chapter is to regulate conduct far beyond the borders of the state. *Southern Pacific Co. v. Arizona,* 325 U.S. 761, 775 (1945); *Edgar v. MITE Corp.,* 457 U.S. at 643. This Chapter does not merely *rearrange* an interstate market among various entities engaged in interstate commerce. *See, e.g., Exxon Corp. v. Governor of Maryland,* 437 U.S. 117 (1978). It acts to *eliminate,* or at least greatly diminish, the interstate market for corporate control. The conclusion that the Indiana Control Share Acquisition Chapter is simple economic protectionism, designed to shield Indiana from the common market of the states, is inescapable.

**C. The Burdens Imposed on Interstate Commerce by the Control Share Chapter Strongly Outweigh any Putative Local Benefits. The Chapter Advances no Benefits Which Are Not Better Served by Other Legislation.**

This Court long ago made a pertinent observation:

> Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant

> when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states.

*Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935).

It is respectfully suggested that this Court disregard the "nice distinctions . . . between direct and indirect burdens" and declare this statute to be *per se* violative of the Commerce Clause. However, because this Court has observed that "no clear line separat[es] the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach[,]" *Brown-Forman,* 106 S. Ct. at 2084, a discussion of the *Pike* test is also appropriate.

The *Pike v. Bruce Church* balancing test consists of two prongs:

> [1] Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. [2] And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

*Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The allocation of the burden of proof when a statute is challenged was addressed in later cases.

> Once a state law is shown to discriminate against interstate commerce "either on its face or in practical effect," the burden falls on the State to demonstrate both that the statute "serves the legitimate local purpose," and that this purpose could not be served as well by available non-discriminatory means.

*Maine v. Taylor,* 106 S. Ct. at 2448.

**1. The Burdens on Interstate Commerce Imposed by the Control Share Chapter Far Outweigh any Valid Interests Advanced by the Statute.**

The direct burdens on interstate commerce imposed by the Chapter have been adequately described elsewhere.[21] The statute establishes nearly insuperable hurdles to prevent tender offerors, wherever resident, from transacting business with other shareholders.

To balance against this direct burden, Indiana suggests that the Chapter advances several state interests: (1) an interest in the welfare of employees of domestic corporations with headquarters, factories or other operations in the state; (2) an interest in "enacting the Indiana statute for the benefit of *all* shareholders of covered Indiana corporations"; and (3) an interest in protecting minority shareholders from the coercive effects of two-tiered tender offers.

What the state fails to recognize is that the protection of state jobs and industries, while a laudable goal, may not be advanced by the enactment of discriminatory legislation, the purpose and effect of which is to stifle interstate commerce. *Toomer v. Witsell,* 334 U.S. 385 (1948). "[T]he Court has viewed with particular sus-

21. *See ante,* pp. 3-5.

picion state statutes requiring business operations to be performed in the home state that could more efficiently be performed elsewhere. . . . [T]his particular burden on commerce has been declared to be virtually *per se* illegal." *Pike,* 397 U.S. at 145. While the state has every right to promote the economic welfare of its citizens, it cannot do so by erecting barriers to corporate control at the state borders. Our economic unit is the Nation; it must be Indiana's economic unit also.

The suggestion that Indiana has a legitimate interest in the welfare of *any* shareholder of an Indiana corporation, wherever resident, flies in the face of the majority opinion (Section V-B) in *Edgar v. MITE Corp.,* 457 U.S. at 644: "While protecting local investors is plainly a legitimate state objective, the State has no legitimate interest in protecting nonresident shareholders." In this regard, the emphasis placed by CTS and Indiana upon the "internal affairs doctrine" is misplaced. CTS and Indiana interpret this conflicts of law principle[22] as granting Indiana unfettered license to interfere with the national market for corporate control. But Indiana is granted no extraordinary interest in a corporation simply because that corporation has filed a few papers with the Indiana Secretary of State and pays a *de minimus* annual fee into the state coffers. Corporate voting rights do have their basis in state law, as Indiana notes, but these rights may not be regulated without regard to the effect on interstate commerce. "[T]he right to engage in interstate commerce is not the gift of a state. . . ." *Hughes v. Alexandria Scrap Corp.,* 426 U.S. 794, 808 (1976).

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22. *Edgar v. MITE Corp.,* 457 U.S. at 645 (majority opinion).

In their haste to invoke the "internal affairs doctrine" as justification for the extensive regulation of interstate commerce, CTS and Indiana forget the teaching of this Court. "Tender offers contemplate transfers of stock by stockholders to a third party *and do not themselves implicate the internal affairs of the target company.*" *Edgar v. MITE Corp.*, 457 U.S. at 645 (majority opinion, emphasis added). Here Indiana regulates *shareholders*, not Indiana corporations. *Fleet Aerospace Corp. v. Holderman*, 637 F. Supp. 742, 763 (S.D. Ohio 1986), *aff'd* 796 F.2d 135 (6th Cir. 1986).

Perhaps most importantly, the Chapter, while denuding some shareholders of the right to vote their stock at the whim of management, does not advance the very interests it purports to protect. Nothing in the statute prevents *management* from selling Indiana assets, shutting down Indiana factories and eliminating Indiana jobs;[23] nothing in the Chapter protects minority shareholders from coercive two-tiered tender offers, so long as *management* is friendly to the offeror; finally, nothing in the Chapter prevents the great majority of shareholders from losing the potential benefits[24] of the interstate market for corporate control. *Dynamics v. CTS*, 794 F.2d at 264. The Chapter spells the demise of eminently fair "any and all" tender offers just as assuredly as it defeats two-tiered tender offers. The only distinction recognized by the statute is whether or not the bidder is friendly to management.

Thus, balanced against a directly intended, highly effective burden on interstate commerce is *one* putative bene-

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23. *Fleet Aerospace*, 637 F. Supp. at 764.

24. *See* discussion of benefits of tender offers to shareholders in *Edgar v. MITE Corp.*, 457 U.S at 643 (majority opinion).

fit—the protection of Indiana resident minority shareholders from coercive two-tiered tender offers. (While the *Pike* test envisions the Court weighing "putative local benefits," it need not weigh nonexistent or invalid concerns.) Where, as here, the burden on interstate commerce is direct, intended and substantial, the state has the burden of showing that its oppressive legislation would actually advance the state's only legitimate interest. Indiana has not done so;[25] instead, it has enacted a statute which interferes with the interstate market for corporate control, while leaving incumbent management free to alter the Indiana economic base as it pleases.

### 2. Any Legitimate Local Purpose Served by the Control Share Chapter could be Served as Well by Available Nondiscriminatory Means.

In its brief of December 4, 1986, Indiana omitted mention of the second prong of the *Pike v. Bruce Church* test:

> [T]he extent of the burden that will be tolerated will of course depend upon the nature of the local interest involved, *and on whether it could be promoted as well with a lesser impact on interestate activities.*

*Pike,* 397 U.S. at 142 (emphasis supplied). *See also, Maine v. Taylor,* 106 S. Ct. at 2448.

Here, the nature of the concern is the regulation of Indiana corporations. The state's interest in economic regulation is accorded a much lower status in Commerce Clause analysis than is its interest in safety regulations,

25. The state has indicated it has no evidence it wants to present. *Dynamics v. CTS,* 794 F.2d at 260.

health matters or the local environment. *H. P. Hood & Sons,* 336 U.S. at 533; *Sporhase v. Nebraska ex rel. Douglas,* 458 U.S. 941, 956 (1982). Significantly, Indiana has enacted two other statutes which purport to provide exactly that type of protection Indiana suggests is needed by shareholders of Indiana corporations. The Indiana Business Combination Statute[26] and the Dissenters' Rights Statute[27] both provide protection for minority shareholders caught in the "back end" of purportedly coercive two-tiered tender offers.[28] The Control Share Chapter, on the other hand, "protects" shareholders from the beneficial impact of fair tender offers, while providing no shareholder protection from the array of defensive maneuvers available to management.

## II. THE CONTROL SHARE ACQUISITION STATUTE IS PREEMPTED BY THE WILLIAMS ACT.

Under the Supremacy Clause, the issue is whether Indiana's Control Share Chapter is preempted by the Williams Act. The Chapter is preempted because: (1) it conflicts directly with the requirements of the Williams Act;[29] and (2) it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the Williams Act.[30]

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26. Chapter 23-1-43.

27. Chapter 23-1-44.

28. Amicus Curiae takes no position here on the wisdom or constitutionality of either statute.

29. *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-43 (1963); *Franklin Nat'l Bank of Franklin Square v. People,* 347 U.S. 373 (1954).

30. *Hines v. Davidowitz,* 312 U.S. 52, 67-68 (1941).

The Control Share Chapter directly conflicts with the Williams Act by requiring the approval of a majority of "disinterested" shareholders before the objective of a tender offer can be fulfilled, i.e., the takeover of the company.[31] The mechanism by which such approval is obtained rests entirely in the hands of management.[32] The process is replete with an array of opportunities for delay, uncertainty and unfairness. The Chapter allows nationwide tender offers to be scuttled by a small minority of shareholders: (i) sufficient Indiana shareholders to invoke the Chapter and (ii) a majority of the "disinterested" shareholders, presumably those who oppose the offer. *See* footnote 14, *supra*.

The Chapter also conflicts with and frustrates the objectives of the Williams Act. The Williams Act is the product of intense investigation, discussion and compromise by Congress. Congress sought to promote fairness and protection of the investor-shareholder in the tender offer setting. It also considered the opportunities that should be available in our national free market system for incumbent management to retain its control of a company and for others to oust that management when they believe they can do a better job. This is the essence of the balancing of the Williams Act and the neutrality sought by Congress in the tender offer setting. The ". . . function of federal regulation is to get information to the investor by allowing both the offeror and the incumbent managers of a target company to present fully their arguments and then *to let the investor decide for*

31. Ind. Code Ann. § 23-1-42-9.

32. Ind. Code Ann. §§ 23-1-42-7, 8 and 10.

*himself.*"[33] ". . . Congress intended for investors to be free to make their own decisions."[34] "Congressional policy is to permit the investor his own independent but informed decision whether to sell."[35]

### A. The Control Share Chapter Conflicts Directly with the Requirements of the Williams Act.

One of the chief problems with the Chapter is the delay and uncertainty which it injects into the tender offer process. The Chapter allows management to delay a special shareholder meeting on the voting rights issue for at least fifty (50) days. No provision is made in the Chapter for the tallying of the vote on the resolution. During this time period, the potential acquiror cannot reasonably be expected to purchase any tendered shares—they have been stripped of their voting rights, rights restored only by a majority vote of the "disinterested" shareholders. Similarly, management cannot be expected to sit quietly during this time period. Undoubtedly, it will use the additional time to put various defensive measures in place, time which would be unavailable to it under the Williams Act.

In contrast to the almost unlimited delay provided for by the Control Share Chapter, the Williams Act permits the tender offeror to close an offer after twenty (20) business days. In drafting the Williams Act, Congress recognized that delay deters wealth-maximizing tender offers by giving entrenched management more time to

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33. *Great Western United Corp. v. Kidwell,* 577 F.2d 1256, 1276 (5th Cir. 1978) *rev'd on venue grounds sub nom., Leroy v. Great Western United Corp.,* 443 U.S. 173 (1979) (emphasis added).

34. *Edgar v. MITE Corp.,* 457 U.S. 624, 639 (1982).

35. *Martin-Marietta Corp. v. Bendix Corp.,* 690 F.2d at 568.

implement defensive measures.[36] As noted previously, delay enables a target company to repurchase stock, enter into lock-up arrangements, announce dividend increases or stock splits, issue more stock, arrange defensive mergers, enter into restrictive loan agreements, institute litigation or take other action to increase the cost and uncertainty of the take-over attempt. *Martin-Marietta Corp., supra,* at 568.

The fact that the State of Indiana can conjure up a method by which tender offerors could hypothetically comply with both the Williams Act and the Indiana statute misses the mark entirely.[37] The Williams Act sets forth the obligations of a tender offeror seeking control of a company. Obviously, if an offeror wanted to, it could leave its offer open longer or it could heavily condition its acceptance of tendered shares, but the imposition of such delay, the creation of such uncertainty, upsets the balance and neutrality sought by the Williams Act, tipping the scales greatly in favor of management.

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36. *Edgar v. MITE Corp.*, 457 U.S. at 636-38.

Congress continued to recognize the consequences of delay when it enacted the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 12 et seq.:

> [I]t is clear that the short waiting period [the 10-day proration period provided in § 14(d)(6) of the Securities Exchange Act of 1934 which applies only after a tender offer is commenced] was founded on congressional concern that a longer delay might unduly favor the target firm's incumbent management and permit them to frustrate many pro-competitive cash tenders. This ten-day waiting period thus underscores the basic purpose of the Williams Act—to maintain a neutral policy towards cash tender offers, by avoiding lengthy delays that might discourage their chances for success.

H.R. Rep. No. 94-1373, 94th Cong., 2d Sess. 12, *reprinted in* 1976 U.S. Code Cong. & A. News 2637, 2644.

37. Brief of Intervenor-Appellant State of Indiana, at 62-77.

The Chapter's approval process also superimposes a one-sided proxy contest on the tender offer. By stripping the voting rights of all shares or proxies tendered to the acquiror and by establishing a procedure whereby the so-called "disinterested" shareholders control the outcome of the resolution, the Chapter directly conflicts with the Congressional intent that the right to vote be a fundamental aspect of equity security ownership and with the atmosphere of "fair play" which Congress intended the proxy rules to foster.[38] As the court said in *Reserve Life Ins. Co. v. Provident Life Ins. Co.*, 499 F.2d 715, 725-26 (8th Cir. 1974), *cert. denied* 419 U.S. 1107 (1975):

> Under these [proxy] rules, an atmosphere of "fair play" must pervade the solicitation of proxies so that in struggles for corporate control, like the present one, competing interests are furnished equal opportunities to communicate with and thereby influence the shareholders in the exercise of their corporate suffrage rights.

Here management is given statutory license to exploit the proxy rules to delay offers beyond the fifty (50) days, thus injecting more uncertainty into the process. Moreover, under the Chapter, management has the exclusive right to present the voting rights issue to the shareholders and to take a position on the issue. No provision is made for the offeror to present its views nor can the acquiring person solicit any proxies in its own behalf. Any proxy granted the acquiring person would fall within the definition of "interested shares" and would automatically be

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38. *J. I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964) ("fair corporate suffrage is an important right that should attach to every equity security bought on a public exchange").

stripped of voting rights.[39] Such a one-sided proxy solicitation directly conflicts with the Williams Act and the proxy rules promulgated thereunder.[40]

**B. The Control Share Act Stands as an Obstacle to the Accomplishment of the Purposes and Objectives of the Williams Act.**

As the State of New York so aptly pointed out in its brief,[41] the underlying objective of the Williams Act is the protection of investors. *See Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 29 (1977). Congress sought to protect investors by embracing a policy of strict neutrality between the bidder and management of the target company. In enacting the Williams Act:

> . . . Congress intended to strike a balance between the investor, management, and the takeover bidder. The bidder was to furnish the investor and the target company with adequate information but there was no "inten[tion] to do . . . more than give incumbent management an opportunity to express and explain its position." . . . Once that opportunity was extended, Congress anticipated that the investor, if he so chose, and the takeover bidder should be free to move forward within the time frame provided by Congress.

*Edgar v. MITE Corp.*, 457 U.S. at 634. This policy of neutrality is "a major aspect of the effort to protect the

39. Ind. Code Ann. § 23-1-42-3.

40. See 15 U.S.C. § 78n.

41. Brief Amicus Curiae of the State of New York in Support of Appellants, at 9.

investor"; it complements the disclosure requirements and other investor protections of the Williams Act.[42]

The Control Share Chapter subverts this protection of investors by putting in place a management-controlled mechanism which makes virtually impossible any uninvited tender offer, regardless of the number of shareholders who favor it. It prevents the shareholder investor from tendering his shares for a premium to an acquiring entity if only a few shareholders in the corporation do not tender and those so-called "disinterested" shareholders vote against the tender offer. Thus, a minority of shareholders sympathetic to management can thwart a tender offer by voting not to restore the voting rights to the acquired shares, leaving the acquiring entity with the bleak prospect of owning a substantial block of stock stripped of the ability to take control of the corporation. The take-over is effectively scuttled, as is the ability of individual shareholders to sell their shares for a premium price. Such control over the outcome of a tender offer by management and those shareholders who may be sympathetic to management clearly upsets the balance of neutrality sought by Congress through the Williams Act.

The states' argument that such legislation encourages bidders to negotiate with incumbent management is a position unsupported by the Williams Act. There is no Congressional preference for negotiated take-overs at the expense of contested take-overs. State statutes that promote this objective, however laudable, must yield to Congress' determination. Contested take-overs should neither be encouraged nor discouraged.

42. *Edgar v. MITE Corp.*, 457 U.S. at 633.

## CONCLUSION

As Judge Posner aptly stated, "[t]he Indiana statute is a *lethal* dose [to constitutionally-protected tender offers]; the fact that the Illinois statute [struck down in *Edgar v. MITE Corp.*] may have been two or three lethal doses has no practical significance." *Dynamics Corp. of America v. CTS Corp.*, 794 F.2d 250, 262-63 (emphasis supplied). Judge Posner's assessment is accurate—after one lethal dose it is irrelevant how many more are administered. There is no difference between the Illinois statute struck down in *Edgar v. MITE Corp.*, in which a state agency was empowered to pass judgment on the fairness of a tender offer, and the Indiana Chapter in which the voting power of stock is stripped away until the "fairness" of the tender offer is passed upon by a jury of those who have already decided against tendering their shares.

The Chapter violates the Commerce Clause under both the direct regulation and the indirect burden analyses. It obtains no protection from the internal affairs doctrine. It is preempted by the Williams Act and thus violates the Supremacy Clause. This Court should affirm the judgment of the court below.

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(12) (11)

Nos. 86-71 & 86-97

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

CTS CORPORATION,
*Appellant*,

—v.—

DYNAMICS CORPORATION OF AMERICA,
*Appellee*.

STATE OF INDIANA,
*Intervenor-Appellant*,

—v.—

DYNAMICS CORPORATION OF AMERICA,
*Appellee*.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

## AMICUS CURIAE BRIEF OF THE SECURITIES INDUSTRY ASSOCIATION, INC. IN SUPPORT OF APPELLEE

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

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—v.—

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STATE OF INDIANA,

*Intervenor-Appellant,*

—v.—

DYNAMICS CORPORATION OF AMERICA,

*Appellee.*

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## AMICUS CURIAE BRIEF OF THE SECURITIES INDUSTRY ASSOCIATION, INC. IN SUPPORT OF APPELLEE

Pursuant to Rule 36.2 of this Court, and with the consent of the parties, The Securities Industry Association, Inc., submits this brief as *amicus curiae* in support of appellee Dynamics Corporation of America.

## THE INTEREST OF THE SECURITIES INDUSTRY ASSOCIATION, INC.

The Securities Industry Association, Inc. ("SIA") is a trade association comprised of approximately 500 securities brokers and dealers transacting business both nationally and internationally. Its membership is responsible for over ninety percent of the securities brokerage business conducted in this country and includes members of every national securities exchange as well as securities firms that are not members of any exchanges.

SIA's members service securities investors of every size and type and perform a complete spectrum of professional securities activities, including retail and institutional brokerage, over-the-counter market making, underwriting and other investment banking activities, various exchange floor functions, and money management and investment advisory services. As a consequence, SIA is generally recognized as a spokesman for the securities industry in general and the broker-dealer community in particular.

The issues in this case involve the constitutionality of the so-called "second generation" of state takeover statutes, which are designed to regulate, and in most instances discourage, tender offers for corporate control other than those favored by incumbent management. These statutes purport to replace an earlier series of state tender offer statutes whose unconstitutionality was determined by this Court in *Edgar v. MITE*, 457 U.S. 624 (1982) ("*MITE*"). In fact, however, the efforts undertaken by the states since *MITE* to accommodate their takeover legislation to the concerns articulated by this Court in that case have been largely cosmetic. The primary purpose and effect of the state takeover statutes, to delay and deter unsolicited control acquisitions, has remained unaltered in the transition from the pre-*MITE* statutes to the more modern variety, of which the statute under review is a typical example.

As a recognized spokesman and representative of the securities industry on legislative and policy matters, SIA has re-

garded with growing concern the spectre of renewed efforts at local regulation of the national securities market by means of state takeover statutes. There are few economic phenomena less local and more national in character than tender offers for corporate control. Tender offers are offered on a non-discriminatory nationwide basis to all shareholders of a target corporation. Where large public corporations are involved, these shareholders will generally be found in nearly every state in the Union. Indeed, because the shares of such corporations are generally traded on a daily basis on one or another of the nationwide securities exchanges it is generally impossible to pinpoint, on a geographic basis, where all shareholders are located.

Shareholders who choose to accept an offer will generally send their acceptances and, eventually, their stock certificates, to the bidder's depository, whose offices will usually be located in one of the nation's major financial centers, outside the state of residence of most target shareholders and, more often than not, outside the state of domicile of either the bidder or the target corporation. Other shareholders, rather than awaiting completion of an offer which might be withdrawn or defeated, often choose to seek an immediate cash premium by selling their shares on the open market at a price that will have risen significantly in the wake of the tender offer announcement. Such trading, which guarantees many shareholders a profit even when an offer is withdrawn, usually takes place on the floor of a national exchange, which again is usually located in a state unrelated to the domicile of shareholder, target or bidder.

In the above ways and others, tender offers impact directly and substantially on the national securities market. The market factors and processes underlying these tender offers are consequently nationwide in character and—save for the impact of the local state statutes under review—are affected only slightly, if at all, by considerations specific to any single locality.

State attempts to regulate, and, in most cases, burden, nationwide tender offers occasion several negative results for

shareholders. In the first place, by discouraging and deterring tender offers, they deny to shareholders the premium values characteristic of such offers. Additionally, the threat, theoretical or actual, of a tender offer often forces an inefficient or insensitive management to respond more directly to shareholders' concerns with a consequential improvement in the market position of the corporation's stock. The removal of such threat is likely to have a depressing effect on the shares of such corporations and ultimately on the securities market as a whole. *MITE*, 457 U.S. at 643.

Furthermore, even where local statutes do not ultimately thwart a tender offer, they inevitably add a high level of confusion and uncertainty to the tender offer process. Under the federal scheme, set up by the Williams Act, the rules and processes for tender offers are clear, uniform, and straightforward. Brokers, dealers, investment advisors and the other members of the securities industry are generally conversant with their details. The superimposition upon this interstate framework of a variety of state regulatory schemes differing in their particulars cannot help but confuse shareholders and their investment advisors in reaching the economic decisions they must make with respect to their shares.

It is the position of SIA that tender offers, for all the controversy focused on them in recent years, are on the whole a beneficial influence on the national economy and on the national securities market. Even if additional regulation were thought to be necessary to deal with any abuses in the tender offer process, such regulation would be ultimately dysfunctional and detrimental to securities holders unless it were national in scope and operation. Through promulgation of the Williams Act, and through frequent consideration of additional legislation, Congress has shown itself equal to the task of providing the necessary regulation.

Conversely, local legislation, impacting upon and burdening nationwide tender offers, clearly interferes with the interstate commerce in corporate securities. Such legislation disturbs the existent federal regulatory framework established by Congress

with respect to tender offers and complicates any additional steps Congress may take with respect to regulating this interstate phenomenon. These considerations underlay this Court's decision in *MITE*, which effectively eliminated the first generation of state takeover legislation. It is respectfully submitted that these same considerations mandate a similar conclusion with respect to the statute under review, as well as with respect to all local statutes similarly devised to evade the effects of the *MITE* ruling.

## SUMMARY OF ARGUMENT

During the 1960s, tender offers arose as an increasingly common method for the achievement of corporate control. Pursuant to this method of control acquisition, potential acquirors, by-passing the sometimes hostile managements of target corporations, placed their offers to purchase controlling interests in corporations directly before the target's shareholders. Although tender offers generally offered substantial premiums to shareholders, and, additionally, conferred economic benefits to the economy as a whole, *MITE*, 457 U.S. at 633, Congressional concern increased over the fact that, at the time, tender offers operated in a regulatory vacuum, outside the disclosure requirements of the federal securities laws, and with no specified time period in which they were required to remain open.

The legislative reaction was the Williams Act, whose underlying purpose was to regulate tender offers for the protection and benefit of shareholders faced with a request to tender their shares. While, in its formative stages, the proposed Williams Act legislation was infused with an avowedly pro-management viewpoint, Congress' increasing realization of the substantial economic benefits conferred by tender offers led it to adopt, instead, a regulatory scheme designed not to inhibit tender offers, but rather characterized by a strict neutrality between the interests of incumbent target management, on the one

hand, and those of the offeror on the other. *See MITE*, 457 U.S. at 633.[1] The Williams Act legislation, as ultimately adopted, provided that shareholders receive full and timely disclosure with respect to matters material to their investment decisions and that tender offers proceed within a time frame carefully calibrated to benefit neither bidder nor management.

In the years since the promulgation of the Williams Act, tender offers have become an increasingly significant phenomenon in our nation's economic life. While Congress has often been requested by groups responsive to existing corporate management to enact legislation more restrictive of hostile takeovers, it has consistently declined to upset the delicate neutral balance embodied in the Williams Act.

These efforts, however, have often found more sympathetic ears in the state legislatures, which bodies are, in any case, more easily subject to the influences and pressures of local corporations. Thus, although at the time of the promulgation of the Williams Act there existed virtually no state legislation purporting to regulate acquisitions of corporate control,[2] in the years following a large number of states adopted statutes specifically designed to regulate tender offers. In most instances these state takeover statutes imposed requirements more burdensome on offerors than those provided for in the federal statute. These sometimes took the form of additional disclosure obligations and requirements for prior administrative review and approval of tender offers. Almost universally, such statutes established time frames which virtually assured that tender offers could not be consummated during the time

1 The legislative history amply reveals that the promulgators of the Williams Act had no intention to inhibit tender offers and even believed that the act "might encourage them." Nor did Congress intend to deny to shareholders "the opportunities which result from the competitive bidding for a block of stock of a given company," 113 Cong. Rec. 24,665-6 (1967) (remarks of Sens. Williams and Javits).

2 In 1968, when the Williams Act was enacted, Virginia was the only state which had a takeover statute and its law had been recently passed and never enforced.

periods established under the Williams Act. While the constitutionality of such statutes was consistently challenged, these takeover statutes often provided target managements with effective tools to at least delay a hostile offer until a more secure defensive device could be implemented.

Finally, this Court, in *MITE*, addressed head-on the question of the constitutionality of the state takeover statutes. A clear majority of the Court held that the Illinois takeover statute violated the Commerce Clause of the Constitution by the impermissible restrictions it imposed upon interstate securities transactions. A plurality of the Court, additionally, held that the statute violated the Supremacy Clause of the Constitution by obstructing the regulatory scheme established by Congress in the Williams Act. With respect to each of these constitutional bases the operative impermissible characteristic of the statute was the same—that it operated to delay and impede nationwide tender offers for corporate control.

Following this Court's ruling in *MITE*, the state takeover statutes then extant were consistently struck down by the courts, or their enforcement abandoned by state regulatory commissions. Very recently, however, the investment community has witnessed the resurrection of the state takeover statutes in a different garb. Under the prodding of local corporate managements, states have increasingly adopted "second generation" takeover statutes variously labelled as "control share" statutes or "business combination" statutes. These statutes purport to regulate not the tender offer process itself, but rather the purchase of shares pursuant to such offers or the exercise of the essential rights of such shares following the purchase of corporate control.[3] While the statutes may vary in their particulars, their purpose and effect is identical—to delay,

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3 "Control share" statutes generally provide that one seeking to purchase more than a specified percentage (often 20%) of a corporation's stock cannot complete such purchase absent the approval of a majority of the shareholders of the corporation. The potential acquiror is generally excluded from participating in such vote. The Indiana statute under review technically permits a sale transaction to occur

impede and ultimately thwart nationwide tender offers and corporate control acquisitions.

Any differences between these "second generation" statutes and the pre-*MITE* legislation they replaced are more apparent than real. As the Court of Appeals in the instant case noted, while such statutes are "[c]leverly drafted . . . to skirt judicial holdings that forbid states to delay tender offers beyond the period required by the Williams Act, *the cleverness is fairly transparent*." 794 F.2d at 261 (emphasis supplied). Where the purpose of a local statute is to delay and discourage hostile tender offers and where the direct effect of the statute is the same, the particular form and method utilized to achieve this result should not immunize the statute from constitutional attack. To hold otherwise would be to permit form to rule

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prior to shareholder approval but blocks the transfer of any voting rights absent such approval.

"Business combination" statutes operate to block an acquiror's ability to undertake a wide series of corporate transactions for an extended period of time even if he has purchased most or all of the shares in a target corporation. Thus, Indiana's business combination statute, Ind. Code, § 23-1-43-1 *et seq.* (1986), which is not the subject of the instant appeal, limits the acquiror's ability to cause the corporation to engage in a wide number of corporate transactions, including mergers, liquidations and the sale, lease, exchange, mortgage, pledge, transfer or other disposition of assets or the issuance of dividends beyond stated percentages and stated amounts. These restrictions, however, apply only in the case of a hostile acquiror.

The purpose and effect of both types of statutes is to deter and discourage anyone from purchasing a control interest in a corporation. Thus, for example, while the State of New York in its *amicus* brief (at p. 9) seeks to characterize its own business combination statute as more neutral than the Indiana statute under review, the Governor's Program Memorandum, 1985 N.Y. Laws Chap. 915, accompanying the New York statute, candidly acknowledged that "the effect of the legislation" was "to encourage a potential acquiror to negotiate its proposed acquisition with the board of directors *and to discourage unilateral takeovers* that depend on the assets of the target." *Id.* at p. 8 (emphasis added).

We suggest that the Court, if it invalidates the Indiana control share statute, make it clear in its opinion that other statutes such as business combination statutes which similarly attempt to evade the *MITE* holding and impede takeovers will also not pass constitutional muster.

substance, and to open the door to facile evasions of the Court's constitutional ruling.[4]

It is respectfully submitted that *MITE* and its progeny are fully dispositive with respect to the Indiana statute and to the generality of "second generation" takeover statutes of which it is representative. The continued attempt to use these statutes to undermine federal policies and overstep constitutional boundaries can only be prevented by this Court's declaration, in unambiguous terms, of the plain unconstitutionality of any state legislation which obstructs the nationwide securities market by setting up delays and impediments to nationwide tender offers and other control acquisitions.

## ARGUMENT

### I. THE INDIANA STATUTE IS PREEMPTED BY THE WILLIAMS ACT

#### A. Under *Mite*, State Statutes Must Not Delay Or Impede Tender Offers

Under the preemption doctrine, which is founded upon the Supremacy Clause of the Constitution, a state law will be deemed unconstitutional where such law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Jones v. Rath Packing Co.*, 430 U.S. 519, 526, 540-41 (1977). In *MITE*, a plurality of this Court held that a state statute whose terms operated to impede and delay nationwide tender offers was unconstitutional in that it constituted an

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4 Not surprisingly, the courts which have considered the "second generation" state control acquisition statutes have, following *MITE*, ruled such statutes unconstitutional under either the Commerce or Supremacy Clauses of the Constitution or both. *See, e.g.*, in addition to the decision under review, *Fleet Aerospace Corp. v. Holderman*, 796 F.2d 135 (6th Cir. 1986); *Gelco Corp. v. Coniston Partners*, C.A. No. 3-86-847 (D. Minn. Nov. 10, 1986); *Icahn v. Blunt*, 612 F. Supp. 1400 (W.D. Mo. 1985); *APL Ltd. Partnership v. Van Dusen Air, Inc.* 622 F. Supp. 1216 (D. Minn. 1985); *Terry v. Yamashita*, 643 F. Supp. 161 (D. Hawaii 1986).

obstacle to the purposes and objectives of Congress in enacting the Williams Act which regulates the making and, in particular, the timing of such tender offers.

It is respectfully submitted that the plurality opinion in *MITE* was correct and that the same grounds and reasons which led the plurality to apply the preemption doctrine in *MITE* clearly mandate a finding of unconstitutionality with respect to the Indiana statute at issue here.

The plurality opinion in *MITE* held that the Illinois statute at issue in that case conflicted impermissibly with the Williams Act in that, in its pro-management leanings, it disturbed the balance of strict neutrality between management and offeror which Congress, in enacting the Williams Act, had determined to provide the best protection for shareholders in corporate control contests.

> There is no question that in imposing these requirements, Congress intended to protect investors. But it is also crystal clear that a major aspect of the effort to protect the investor was to avoid favoring either management or the takeover bidder. . . . As Senator Williams explained:
>
> > "We have taken extreme care to avoid tipping the scales either in favor of management or in favor of the person making the takeover bids."
>
> 113 Cong. Rec. 24,664 (1967). This policy of "evenhandedness" represented a conviction that neither side in the contest should be extended additional advantages vis-a-vis the investor, who, if furnished with adequate information, would be in a position to make his own informed choice. We, therefore, agree with the Court of Appeals that *Congress sought to protect the investor not only by furnishing him with the necessary information but also by withholding from management or the bidder any undue advantage that could frustrate the exercise of an informed choice.*

457 U.S. at 633-34 (emphasis supplied) (citations omitted).[5]

A particular element of this carefully balanced approach adopted by Congress with respect to tender offers involved granting to the target's shareholders sufficient time to receive and digest the informational materials required to be distributed under the Williams Act while, at the same time, not permitting tender offers to be so delayed as to impede their consummation or grant to target management an undue advantage in resisting takeover attempts.

> . . . Congress intended to strike a balance between the investor, management and the takeover bidder. The bidder was to furnish the investor and the target company with adequate information but there was no "inten[tion] to do . . . more than give incumbent management an opportunity to express and explain its position." Once that opportunity was extended, Congress anticipated that the investor, if he so chose, and the takeover bidder should be free to move forward *within the time frame provided by Congress.*

*Id.* at 634 (emphasis added) (citations omitted).

Noting that "[d]elay has been characterized as the most potent weapon in a tender offer fight" (*id.* at 637 n.12), the plurality of this Court concluded, on the basis of the legislative history of the Williams Act as well as subsequent Congressional expressions of policy, that timing was an integral element of the legislative scheme inherent in the Williams Act. Indeed the plurality in *MITE* concluded, correctly we submit, that the Illinois statute violated the Supremacy Clause precisely

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5 The clear intendment of Congress to adhere to a policy of strict neutrality in corporate control contests was recently reaffirmed by the unanimous opinion of this Court:

> The expressed legislative intent [of the Williams Act] was to preserve a neutral setting in which the contenders could fully present their arguments.

*Schreiber v. Burlington Northern, Inc.*, 105 S. Ct. 2458, 2463 (1985).

by reason of the fact that the provisions of such statute contained the potential for delays greater than that provided in the time framework mandated under the Williams Act. *Id.* at 639.[6]

**B. The Second Generation Statutes Violate The Williams Act's Policy Of Neutrality**

In the instant case the shareholder vote provisions of the Indiana statute similarly offend against the time-frame mandated by the Williams Act by virtually assuring that any tender offer conducted pursuant to the Indiana statute will be subject to delays greater than those established by the Williams Act. The statute further provides that the ability to engender such delays shall lie exclusively in the hands of target management. In this manner the careful neutral balance which this Court has recognized to be the essential policy of the Williams Act is overthrown.

Appellants' attempts to reconcile the Indiana statute with the Williams Act are unavailing. Thus, they argue that the potential fifty-day delay imposed on bidders under the statute is no greater a burden upon tender offers than the delays imposed when bidders must leave their offers open due to the necessity of obtaining prior state or federal regulatory approvals, such as those required, for example, under the Hart-Scott-Rodino Antitrust Improvements Act. Appellants' analogy could not be more inapposite. There is no meaningful similarity between delays necessarily imposed by external and neutral regulatory requirements and delays operating at the option and for the benefit of a hostile target management. The extent of any delays created by the need to secure anti-trust approvals will not depend on whether a proposed acquisition is friendly or not. Conversely, the maximum delays permissible under the Indiana statute will occur only when target manage-

6 Securities and Exchange Commission ("S.E.C.") regulations promulgated pursuant to the Williams Act provide that the bidder is not required to keep his tender offer open for more than twenty business days. See 17 C.F.R. § 240.14e-1(a) (1986).

ment wants them to and will serve no separate regulatory function.

Appellants further argue that, unlike the statute deemed unconstitutional in *MITE*, the Indiana statute does not delay commencement or even consummation of the tender offer. Under the statute, they claim, a bidder is free to close his offer within the Williams Act time frame and only his subsequent voting rights are affected. To the objection that no rational tender offeror will purchase shares when he doesn't know if he will ever be able to vote them, appellants offer a "practical alternative" (Brief of Intervenor-Appellant State of Indiana ("Indiana Brief") at pp. 62-73). They claim a purchaser can close an offer within the Williams Act's time frame but make his purchases of target's stock conditional on subsequent shareholder approval of his voting rights.

However, appellants' ''practical alternative''—in itself, complex, burdensome, and unprecedented—ignores the basic negative qualities of delay in tender offer situations which have caused it to be termed ''the most potent weapon'' against hostile takeovers. Delay permits target management time to set up a wide array of defensive measures—ranging from corporate restructuring, to poison pills, to self-tenders, to defensive acquisitions—designed to irrevocably block and impede the takeover even if the shares already have been tendered. *See MITE*, 457 U.S. at 638 n.13. Such defensive actions can be as easily undertaken during the fifty-day delay prior to a shareholder vote under the Indiana statute as during a delay prior to the commencement or closing of a tender offer. The ''practical alternative'' offered by appellants therefore does nothing to cure the negative effects of the delays which this Court condemned in *MITE* but which the Indiana statute still permits target management to effect.

Furthermore, by excessively extending the period between the announcement of an intention to make a bid and the actual successful completion of the offer, the Indiana statute pro-

motes the very uncertainty and market volatility which the Williams Act was intended to minimize.[7]

**C. The Second Generation Statutes Violate The Williams Act's Policy Of Investor Autonomy**

The Indiana statute, moreover, conflicts with the Williams Act in an even more fundamental way. Thus, the Indiana statute clearly establishes as a practical matter that no tender offer can be consummated by any rational bidder absent a shareholder vote that will grant him the voting rights that are the reason for the offer in the first instance. This, in effect, requires the bidder to conduct and win a proxy contest with target management before he can purchase shares from any shareholders. Yet the Williams Act clearly intended that the decision to tender one's shares be one that rested with the *individual* shareholder alone and that it was *not* to be made subject, by statute, to another's control or veto.

Thus, one of the vices of the Illinois statute, as found by the plurality opinion in *MITE*, was that it made the individual shareholder's ability to accept a tender offer subject to the judgment of others—in that case, the Illinois Secretary of State:

> The Court of Appeals *understood the Williams Act and its legislative history to indicate that Congress intended for investors to be free to make their own decisions. We agree.* Both the House and Senate Reports observed that the Act was "designed to make the relevant facts known so that shareholders have a fair opportunity to make their decision." H.R. Rep. No. 1711, 90th Cong., 2d Sess., 4

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7 Rule 14d-2, 17 C.F.R. § 240.14d-2 (1985), promulgated pursuant to the Williams Act, which requires a tender offer to commence not more than five days after public announcement of a bid, was adopted on the basis that longer delays would encourage excessive market and arbitrage activity and thereby "deny security holders the protections which that Act was intended by Congress to provide," Exchange Act Release No. 16384, 44 Fed. Reg. 70,326 (1979), at 70,329. In adopting Rule 14d-2, the S.E.C. stated an express intention to pre-empt state takeover statutes then existent which, by permitting longer delays, operated to "frustrate the operation and purposes of the Williams Act." *Id.* at 70,330.

> (1968); Senate Report, at 3. Thus, as the Court of Appeals said, "[t]*he state thus offers investor protection at the expense of investor autonomy—an approach quite in conflict with that adopted by Congress.*"

*Id.* at 639-40 (emphasis supplied).

The individual shareholder's autonomy with respect to his investment decision is no less restricted by being made subject to the veto of other shareholders. This indeed has been the holding of the courts which, since *MITE*, have considered control share statutes similar to the Indiana statute. *E.g.*, *Fleet Aerospace Corp. v. Holderman*, 637 F. Supp. 742, 756 (S.D. Ohio), *aff'd*, 796 F.2d 135 (6th Cir. 1986) (Ohio Control Shares Acquisition Act unconstitutional on preemption grounds because "it prevents the individual investor from deciding whether to sell his or her stock . . . and places the decision in the hands of other shareholders of the target company."); *Icahn v. Blunt*, 612 F. Supp. 1400, 1420 (W.D. Mo. 1985) (Missouri statute unconstitutional where decision of "whether to buy or to sell [control shares] would be taken out of the hands of the shareholder and the purchaser and placed in the hands of management and other shareholders").

Appellants argue that whatever its purpose or impact, the Indiana statute is constitutionally acceptable because it purports technically to deal with the internal governance of corporate affairs, an area that is the exclusive domain of the states, rather than with the sale or acquisition of securities in a tender offer. Such an elevation of form over substance would, however, be an absurd constitutional principle: if it were accepted, a state could simply provide that a hostile offeror could never merge with the target company, never receive dividends, never have representation on its Board of Directors, or never be allowed to choose corporate officers, all matters which similarly can be said to be matters of "internal governance." The purpose and impact of a statute, and not its title or placement in the state statute book, obviously should determine its constitutional merits.

Indeed, even if viewed mechanistically, the Indiana statute still would not pass constitutional muster, since it is directed not to corporate activity, but rather to the purchase and sale of shares among shareholders. Unlike staggered boards, cumulative voting, or supermajority provisions (corporate governance devices cited by appellants as within the state's power to legislate), which protect minority rights within a corporation by regulating the circumstances pursuant to which the *corporation* can undertake certain actions, the control share statutes operate to directly regulate and discourage transactions among individual shareholders.

Furthermore, unlike the control share statutes, the traditional corporate governance provisions cited by appellants do not operate primarily or exclusively against an acquiror seeking corporate control.[8] The Indiana statute however operates *solely* and *punitively* against a bidder for corporate control. Rather than incidentally affecting his ability to influence the operations of the corporation, it immediately and instantly—upon purchase of the control shares—eliminates the voting rights of his stock and his ability to exercise influence, let alone control, over the company. It is clear, in short, that "internal corporate affairs" is a mere facade for regulation designed directly to deter and delay hostile tender offers.

The State of Indiana does not, in fact, seriously dispute that this is the statute's purpose and effect. Thus, it concedes (Indiana Brief at pp. 91-95) that one effect of the Indiana legislation will be to substantially deter partial tender offers although such tender offers have been consistently recognized

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8 Indeed, the effects of these common corporate governance provisions apply even where corporate ownership is diffused. A supermajority provision may operate just as well to prevent a merger favored by a majority of individual shareholders of a corporation as to prevent a merger favored by a single controlling shareholder. Indeed, such provisions can even benefit a potential acquiror. Thus, a potential acquiror holding 20% of a corporation's voting stock can benefit from an 80% supermajority merger requirement by being able to block a defensive merger undertaken by management. Similarly, cumulative voting guarantees him representation on the board even prior to his achieving a majority position. It is only the takeover statutes, such as the one at issue, which cut but one way—in favor of incumbent management.

as permissible under the Williams Act. And it admits further that the intent and "practical effect" of the statute is to replace the federal securities law policies of the Williams Act with the securities policies of the United Kingdom:

> [T]he Indiana Statute will have a practical effect analogous to that of legislation in the United Kingdom which requires majority shareholder approval of tender offers. The British regulations allow shareholders to simultaneously tender their shares and vote for or against the offer.

Indiana Brief at 95.

While economists might profitably argue the merits of the British approach versus the informed free-market policy embodied in federal law, it is respectfully submitted that the issue of the right of any state to make this choice was settled long ago in our federal Constitution. It is difficult to imagine a clearer violation of the Supremacy Clause than for a state, in a matter broadly affecting the national economy, to choose to adopt the legislative approach of a foreign power over that of the Congress of the United States.

In short, the clear legislative intent of the Williams Act and the reasoning underlying the plurality opinion in *MITE* mandate a finding that the Indiana statute upsets the balance struck by the Williams Act, and is, hence, unconstitutional.

## II. THE INDIANA STATUTE VIOLATES THE COMMERCE CLAUSE OF THE CONSTITUTION

In *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 106 S. Ct. 2080 (1986), this Court, relying *inter alia* on its plurality opinion in *MITE*, recently reaffirmed the "two-tiered approach" traditionally followed in determining the constitutionality of state economic regulation under the Commerce Clause:

> When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor

> in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

106 S. Ct. at 2084 (citations omitted). Under either of the two tests applied "the critical consideration is the overall effect of the statute on both local and interstate activity." *Id.*

In *MITE*, a majority of this Court determined that a state statute that regulated and restricted the purchase and sale of securities pursuant to a nationwide tender offer violated the Commerce Clause in that the substantial burdens it imposed upon interstate commerce outweighed the putative local benefits intended to be served by the legislation. This Court, by a plurality of four justices, additionally held that, irrespective of the balance of national and local interests, the state takeover statute violated the Commerce Clause, because such legislation constituted a direct, rather than incidental, regulation of interstate tender offers, a vehicle of interstate commerce.

As has been noted, the second generation post-*MITE* state takeover statutes, of which the Indiana statute is a fair example, differ only in form from the statute struck down in *MITE*; their intended and operative effects remain the same. The identical reasoning and constitutional considerations which impelled the overturning of the Illinois statute in *MITE* consequently mandate a similar determination with respect to the Indiana statute under review.

### A. The Indiana Statute Is Unconstitutional Per Se As A Direct Burden on Interstate Commerce

> [A] state statute which by its necessary operation directly interferes with or burdens [interstate] commerce is a prohibited regulation and invalid, regardless of the purpose with which it was enacted.

*MITE*, 457 U.S. at 642 (plurality opinion), citing and quoting this Court's decision in *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 199 (1925).

The Indiana statute constitutes a direct burden upon interstate commerce in that the practical effect of the statute is to burden, regulate, and restrict interstate securities transactions outside the territorial jurisdiction of the state. That nationwide tender offers constitute interstate commerce was clearly determined by this Court's decision in *MITE* and cannot be disputed by appellants. 457 U.S. at 641-42 (plurality opinion).

Indeed, in the sheer multitude of its myriad securities transactions carried out across state lines and national boundaries, few business phenomena exhibit more of the characteristics of interstate and international commerce and less of the indicia of localized transactions than does the modern tender offer. The commerce in control shares generally does not involve discussions or negotiations in any particular locality. Buyers and sellers rarely if ever meet. The operative transfers of securities involved occur anonymously and often simultaneously on the floor of a national exchange or by mail or wire receipt of a transmittal form at the central offices of a designated depository.[9] The transactions of this nature involved in even a single moderate-sized tender offer may account for hundreds of millions of dollars in interstate commerce, and tender offers generate transactions involving many billions of dollars of interstate commerce yearly in the United States.

The drastic impact of control share statutes such as Indiana's on such interstate securities transactions simply cannot be questioned. The Indiana statute plainly restricts and burdens the ability of a bidder to purchase and the shareholder to sell, by means of a tender offer or other control share acquisition, securities of a target company. The Indiana legislation so

9 In nationwide tender offers, generally, the consummation of all sale and purchase transactions with respect to the shares tendered pursuant to the offer occur at a single moment, upon the expiration of the offer. At that moment, under the customary terms of the offer, the shares are deemed "accepted" for payment. Actual payment, usually by mail or wire transmittal, occurs shortly afterwards.

operates even though neither the bidder nor the majority of target's shareholders may reside in Indiana and although no operative act of the tender offer will occur in that state.

The Indiana statute accomplishes its burdensome and intrusive effect by granting to entities other than the bidder or the individual investor the ability to delay and thwart, as a practical matter, the tender offer or proposed stock transaction. Thus, as discussed above, under the statute, target management is given the power to delay consummation of the tender offer sufficiently beyond the periods mandated by federal law so as to facilitate defensive mechanisms that may permanently defeat the bid. The shareholder approval provisions further deter tender offers by denuding shares purchased pursuant to such offers of any voting rights, making the regaining of such rights subject to a subsequent vote by a majority of the other shareholders. At best, such provisions force the bidder to follow up his offer with an expensive and time-consuming proxy contest.[10] At worst, it may leave him, having already paid premium value, with "control" shares which give him no influence, let alone control, over the corporation.

The plain effect of these provisions, in most cases, will be that tender offers for target corporations subject to such statutes will simply not be made unless favored and approved in advance by incumbent management. In the rare event that an unsolicited tender offer is conducted, it will be made subject to the condition of subsequent shareholder approval, a condition that management, using the time provided by the statute's built-in delay, will seek to assure will never be met. The attendant difficulties and uncertainties created for the bidder will, in any case, virtually guarantee that, even where tender offers do proceed under the Indiana statute, a much lesser cash premium will be extended to shareholders in the offering price.

Although the Indiana statute's restrictive effect on nationwide tender offers is especially apparent, the statute's

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10 Indeed, under the Indiana statute not only must the bidder bear his own expenses in such a contest but he must also give "an undertaking to pay the *corporation's* expenses" in calling and holding the required stockholders meeting. Ind. Code § 23-1-42-7(a) (1986) (emphasis supplied).

burdensome effect on interstate commerce is not restricted to its effect on tender offers alone. The Indiana statute would substantially deter any unsolicited acquiror from purchasing—on the open market, by privately negotiated transaction, or otherwise—any shares that would bring his total shareholdings in the corporation to over 20%. Yet the vast majority of transactions thus affected would clearly not involve Indiana residents or acts taking place in Indiana. The Williams Act, by contrast, only requires that full disclosure as to intentions and background of a holder of over 5% of an issuer's shares be made prior to any additional purchases. The substantial burdens added on by the Indiana statute clearly restrict, in a major fashion, the freedom of non-resident shareholders to engage in interstate commerce.

As the plurality in this Court determined in *MITE*, the imposition by a state of such extraterritorial burdens on a nationwide tender offer directly regulates and restricts interstate commerce and constitutes a *per se* violation of the Commerce Clause.

> [T]he Illinois law, unless complied with, sought to prevent MITE from making its offer and concluding interstate transactions not only with Chicago Rivet's stockholders living in Illinois, but also with those living in other States and having no connection with Illinois. . . . It is therefore apparent that the Illinois statute is a direct restraint on interstate commerce and that it has a sweeping extraterritorial effect.

*MITE*, 457 U.S. at 642.

The conclusions reached in MITE, it is submitted, apply equally to the 'second generation' statutes enacted to avoid MITE's clear impact. Such, at least, has been the consensus of the courts which since *MITE* have considered control share acquisition laws such as the Indiana statute. *See Fleet Aerospace Corp. v. Holderman*, 637 F. Supp. at 760-61; *Icahn v. Blunt*, 612 F. Supp. at 1415-16; *Dynamics Corporation of America v. CTS Corp.*, 794 F.2d at 264; *Terry v. Yamashita*, 643 F. Supp. at 165.

Appellants' contention that the Indiana statute does not regulate interstate commerce because it achieves its deterrent effect through elimination of voting rights rather than through a technical prohibition on the purchase or sale of the target's securities argues on behalf of a formalism which has long since been rejected by this Court. As this Court has made clear, it is not form but *practical effect* that will be determinative on the issue of whether a state's economic regulation impermissibly intrudes on interstate commerce. *E.g., Southern Pacific Co. v. Arizona*, 325 U.S. 761, 775 (1945) (state law overturned on Commerce Clause grounds where "practical effect of such regulation is to control [conduct] . . . beyond the boundaries of the state . . . ."); *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 106 S. Ct. 2080 at 2086 (fact that New York law "is addressed only to sales of liquor in New York is irrelevant if the 'practical effect' of the law is to control liquor prices in other States."); *MITE*, 457 U.S. at 643 (plurality opinion).

In short, the Seventh Circuit's observation on the effect and operation of the Indiana statute is fully accurate:

> [I]n this case the effect on the interstate market in securities and corporate control is direct, intended, and substantial; it is not merely the incidental effect of a general regulation of internal corporate governance. The law in question is an explicit regulation of tender offers; that the mode of regulation involves jiggering with voting rights cannot take it outside the scope of judicial review under the commerce clause. Any other conclusion would invite facile evasions of the clause.

794 F.2d at 264. The Indiana statute, as a direct state attempt to regulate interstate commerce, is thus unconstitutional *per se*.[11]

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11 Appellants' recurrent emphasis that the Indiana statute must be constitutional because it is 'non-discriminatory' is merely a red herring. The Indiana statute is offensive to the Commerce Clause not because it discriminates against other states but because it operates to burden and regulate interstate commerce, which alone is sufficient to violate the Commerce Clause. Lack of discrimination only becomes an

**B. No Significant Local Benefits Exist Which Outweigh The Indiana Statute's Substantial Interference With Interstate Commerce**

In *MITE* this Court determined that no local benefits purportedly conferred by "first generation" takeover statutes, such as the Illinois law overturned in that case, were commensurate with the statutes' "substantial" adverse effects on interstate commerce. These adverse effects were, in the Court's view, drastic in impact and national in scope, affecting both target shareholders and the national economy as a whole:

> The effects of allowing the [state regulatory authority] to block a nationwide tender offer are substantial. Shareholders are deprived of the opportunity to sell their shares at a premium. The reallocation of economic resources to their highest valued use, a process which can improve efficiency and competition, is hindered. The incentive the tender offer mechanism provides incumbent management to perform well so that stock prices remain high is reduced.

457 U.S. at 643.

Such negative impact on non-resident shareholders, non-resident bidders and the United States economy were, this Court observed, offset by no substantial countervailing local benefits conferred on the state or its residents: "Insofar as the Illinois law burdens out-of-state transactions, *there is nothing to be weighed in the balance to sustain the law.*" *Id.* at 644 (emphasis supplied).

The burdensome impact on interstate commerce created by control share statutes such as Indiana's is identical to, if not greater than, those arising out of the "first generation" pre-*MITE* statutes. Indeed, appellants do not seriously contend that the national market in control shares will continue undis-

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issue where, as in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), the statute is designed to affect transactions occurring solely within a state's own borders and thus, absent a discriminatory effect, would pose no constitutional problem.

turbed in the face of these "second generation" statutes. Nor, indeed, do they set against this substantial interference with interstate commerce any substantive local benefits allegedly accruing from the Indiana legislation. Appellants rather respond with a talismanic formula—the "internal affairs" doctrine—the mere invocation of which they suppose sufficient to dissipate all constitutional concerns like so much mist.[12]

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12 Indiana, while not seriously claiming that its legislation will leave tender offers unaffected, puts forward the unique suggestion that the Indiana statute will facilitate rather than impede corporate takeover acquisitions. Making the Indiana statute sound like nothing so much as a Hostile Bidders' Bill of Rights, the State stresses that the law allows offerors an "immediate shareholder vote on the merits of their offers," and that the moral suasion flowing from a favorable vote in this plebiscite will make it more difficult for management to "wage war" against a hostile bid. (Indiana Brief at pp. 75-76). Indeed, Indiana suggests that, by mandating a shareholder vote on voting rights, within "only" 50 days, the "months-long" duration of "bitterly fought takeover battles" will be truncated (Indiana Brief at p. 102).

This prognosis is not only disingenuous in concept, but also flies in the face of logic and experience. Under the federal regulatory scheme tender offers are not required to remain open longer than twenty business days, approximately half the time span provided for by Indiana's provision for an "immediate" shareholder vote. If some tender offers now extend beyond the Williams Act's twenty day period it is primarily because (a) other bidders have arisen and a prolonged auctioning process has ensued; (b) legal deficiencies, such as securities or anti-trust violations, have been found to exist in the bidder's offer; or, most commonly, (c) target management has put in place defensive strategies, in the form of poison pills, self-tenders, or the like, and consummation of the tender offer is made to await judicial determinations as to the propriety of these entrenchment measures designed "to wage war" against the offer. Statutes such as Indiana's obviously do nothing to eliminate the first two of these causes of delay and would *contribute* to the final cause by giving target management more time to implement defensive tactics, generating even further delay.

In sum, the argument that the statute is intended to confer benefits on hostile acquirors is as much of a facade as the statute itself. Far better the candor of the Indiana Chamber of Commerce, which participated in the formulation and drafting of the statute, and which concedes in its *amicus* brief (at p. 18 n.9) that one of the purposes of the statute was "protecting the quality of corporate governance in Indiana *by granting certain protections to corporate directors*" (emphasis supplied).

Thus, appellants contend that because the Indiana statute on its face deals with voting rights of shareholders, which appellants claim, under the "internal affairs" doctrine, to be the province of the states, the practical effect of the statute to deter and burden extraterritorial interstate securities transactions may be conveniently ignored. Appellants' argument proves too little, too much, and, ultimately, nothing at all.

As this Court observed in *MITE*, when faced with the identical argument, the internal affairs doctrine is not a concept relevant to constitutional law but a principle of the conflict of laws. Such principle apportions the power to regulate corporations *between* the States so as to avoid inconsistent rulings or legislation:

> The internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands. *See Restatement (Second) of Conflicts of Laws* § 302, Comment b, pp. 307-308 (1971). That doctrine is of little use to the State in this context. Tender offers contemplate transfers of stock by stockholders to a third party and do not themselves implicate the internal affairs of the target company.

457 U.S. at 645.

There is no basis for attaching to this doctrine constitutional implications. That courts will apply Delaware law to Delaware corporations and Indiana law to Indiana corporations does not mean that either Delaware or Indiana is permitted to enact, under an "internal affairs" rubric, corporate laws that, in violation of the national Constitution, impermissibly intrude upon interstate commerce. The danger of inconsistent rulings which the internal affairs doctrine was intended to minimize is simply not implicated where an area is determined by the Commerce Clause to be the province of federal jurisdiction to the exclusion of that of *any* of the states.

Thus, even were the instant statute predicated on a good faith concern with respect to the internal affairs of Indiana corporations, this would, nevertheless, still not provide the Indiana legislature with *carte blanche* to ignore constitutional limitations and intrude upon interstate commerce.[13] In the instant case, however, appellants' attempts to justify the Indiana statute under the pretext of the internal affairs doctrine are in any event a mere charade. Even the enacters and enforcers of second generation statutes such as Indiana's do not pretend that their statutes are not designed to regulate and restrict hostile tender offers. As noted above, Indiana itself admits that the practical effect of its legislation is to substantially deter otherwise legitimate partial tender offers and to implement a British approach to tender offers by requiring majority approval of shareholders for the sale of control shares.

Similarly, the State of Minnesota, which has enacted a second generation control share statute of its own, admits in its *amicus* brief to this Court ("Minn. Brief") that the purpose and effect of such statutes is to "inhibit the abusive use of takeover tactics" and to mitigate the supposedly "coercive nature of control share acquisitions" (Minn. Brief at 11). The State of New York, as noted, has similarly admitted, for its own part, that the effect of its legislation is to "discourage unilateral takeovers" (*supra* at p. 8 n. 3). It is thus clear that the states themselves do not deny the fully-intended impact of their control share statutes on tender offers.

That the State of Indiana effects such regulation of tender offers through *in terrorem* provisions respecting essential voting rights rather than by directly prohibiting purchases of the tendered shares themselves makes, as has been noted, no

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13 *See*, for example, *Brown-Forman Distillers*, where, despite the "wide latitude" given the States under the Twenty-First Amendment "to regulate the importation and distribution of liquor within their territories," this Court overturned provisions of a New York law regulating the sale of liquor on the basis of the statute's "practical effect" on interstate commerce. 106 S. Ct. at 2086.

practical or legal difference. It is as if a state rather than prohibiting the rental of automobiles permitted their rental—but with their engines removed. As the State of Minnesota has stated in the *amicus* brief it has filed *on behalf of* Indiana's position (*id.* at 15), to attempt any distinction of the Indiana statute on this basis "elevates form over substance":

> Although the [Indiana statute] does not actually require shareholder approval prior to the control share acquisition, the practical effect of the Indiana statute may be just that.

*Id.* at 15 n.15.

If the practical effect of a state statute is to regulate and restrict tender offers, the nature of the particular device effecting such regulation, or the chapter heading of the corporate statute pursuant to which it takes place, cannot be of any constitutional significance. To accept otherwise is to open the door to wholesale regulation of interstate commerce by any state willing to cloak its economic regulation under an appropriate facade. A state, under such a theory, would presumably have the constitutional authority to permanently strip control shareholders of voting rights upon a vote, not of the majority of shareholders, but simply of the incumbent board of directors. For that matter the rights could be removed without recourse to any vote at all, if the state determined that this were an appropriate policy. Nor would a state's regulation be limited to removal of voting rights; it could choose to strip the bidder of dividend rights or of any of the other indicia of ownership as well.

Appellants' invocation of such traditional state corporate governance rules as supermajorities and cumulative voting, as examples of permissible internal governance statutes which impact on interstate commerce, does nothing to support their contentions. As has been noted, such true corporate governance statutes, which genuinely seek to regulate the internal operations of the corporation, bear no relation to the Indiana statute's direct attempt to influence the purchase and sale of

securities between *shareholders* of the corporation and other shareholders or third parties. Indeed, these statutes demonstrate the power of the states to adequately legislate internal corporate governance to protect minority shareholders without recourse to legislation designed to obstruct the interstate securities market or national tender offers.[14]

Similarly, it adds nothing to appellants' arguments to point out that the voting rights stripped away by the Indiana statute in control share transactions are themselves creatures of state corporate law. Such an argument proves too much, since the same could be said with respect to any of the rights attached to corporate securities. Indeed, such securities themselves, as an ultimate matter, are nothing more or less than an agglomeration of various contract and property rights, all created and sustained under state law. This meta-legal truth, however, has never caused this Court or Congress any hesitation in considering transactions involving the sale or purchase of these bundles of rights as interstate commerce. Indeed, the extensive federal regulation of the securities markets, including the Williams Act, is based squarely on the assumption that such transactions do constitute interstate commerce.

In sum, the balancing test required under the Commerce Clause for the Indiana statute is no different than that which was undertaken by this Court in *MITE*. As in *MITE*, the statute here is clearly unconstitutional.

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14 The attempt to support the Indiana statute as an exercise in "shareholder democracy" (*see, e.g.*, Minn. Brief at p. 11) is particularly disingenuous, especially in view of the act's direct effect and intent to disenfranchise shareholders who would otherwise possess over 20% of the shareholder vote, a singularly undemocratic provision.

## CONCLUSION

This Court should affirm the judgment below.

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Respectfully submitted,

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